Supreme Court, U.S.
FILED

No. _____ 95 25 JUL 3 1995

OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1994

Edward Silva, Jr.; Silva Harvesting, Inc.; Ord & Norman; E.O.C. Ord, Inc.; and Edward O.C. Ord, *Petitioners*

v.

United States of America, and United States District Court for Northern California, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDWARD O.C. ORD
Counsel of Record
ORD & NORMAN
650 California Street
26th Floor
San Francisco, CA 94108
415/274-3800
Counsel for Petitioners

June 1995

119 pp

QUESTIONS PRESENTED

1) Whether the denial of a motion to quash a grand jury subpoena brought by a target of the grand jury a final appealable order under the *Perlman* (*Perlman v. United States*, 247 U.S. 7 (1918)) doctrine when the subpoena is issued to an accountant working for the target's attorney and the subpoena calls for documents prepared by the accountant in order to assist the attorney in the defense of the target?

2) Whether the denial of a motion to quash a grand jury subpoena in the circumstances described above is reviewable pursuant to a petition to the Court of Appeals under the All Writs Act, 28 U.S.C. § 1651?

LIST OF PARTIES

The parties listed in the caption to this application are the real parties in interest to this case. In their petition to the Court of Appeals for the Ninth Circuit for an extraordinary writ under the All Writs Act, Petitioners, in addition to the United States of America, also named as respondents the United States District Court for the Northern District of California and some of the United States government officials involved in the underlying grand jury investigation. These officials were Assistant United States Attorney Leo P. Cunningham, Justice Department Trial Attorney Daniel J. Graber, and Internal Revenue Service Special Agent Robert Scott. The Ninth Circuit in captioning the writ petition action named only the United States District Court as

Respondent, with the United States of America as real party in interest, apparently removing the individuals as Respondents. However, as a matter of courtesy and in an abundance of caution, Petitioners will serve Mr. Cunningham, Mr. Graber, and Mr. Scott. In the Ninth Circuit, the United States of America (and presumably the other originally named respondents) was represented by Attorneys Cunningham and Graber. In the District Court, the subpoenaed witness, Charles D. Bailin, joined in the petitioners' motion to quash the grand jury subpoena, but he was not a party to the appeal.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 2

STATEMENT 2

A. The District Court Proceedings 5

B. Proceedings in the Court of Appeals 7

REASONS FOR GRANTING THE PETITION . . 11

I. The Ninth Circuit's Decision Clearly Conflicts with Decisions of Other Circuits. Procedures For Appellate Review of the Invasion of Privilege by Grand Juries Must Be Uniform Among the Circuits. 11

II. The Decision of the Court of Appeals Was Erroneous and Violates *Perlman* and other Decisions of this Court. 24

III. The Decision of the Court of Appeals Poses Serious Consequences for the Criminal Justice System, and the Legal and Accounting Professions, Because it, Practically Speaking, Allows the United States to Invade Validly-Established Communicative and Work-Product Privileges Prior to any Appellate Review, Thus Prejudicing the Defendant's Right to Counsel and the Preparation of a Defense. 34

IV. The Ninth Circuit's Denial of Petitioners' Petition for a Writ of Mandamus Conflicts with Other Circuits' Rulings Recognizing that Mandamus Is Appropriate to Review Validly-Asserted Privileges Prior to Compelled Disclosure. 51

CONCLUSION 63

APPENDIX

1. Opinion of Court of Appeals 2a

2. District Court Memorandum of Decision and other Orders 20a

3. Initial Stay Order by Court of Appeals 35a

4. Court of Appeals Denial of Rehearing 39a

TABLE OF AUTHORITIES

CASES

Admiral Ins. Co. v. United States District Court, 881 F.2d 1486 (9th Cir. 1989) 40, 58

Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3d Cir. 1984) 60

Castle v. Sangamo Weston, Inc., 744 F.2d 1464 (11th Cir. 1984) (per curiam) 39n

Chase Manhatten Bank, N.A. v. Turner & Newhall, PLC, 964 F.2d 159 (2d Cir. 1992) . . 57-58

Church of Scientology v. United States, ___ U.S. ___, ___, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) 25

City of Las Vegas v. Foley, 747 F.2d 1294 (9th Cir. 1984) . . . 55

City of Los Angeles v. Williams, 438 F.2d 522 (9th Cir. 1971) 51n, 52

Cobbledick v. United States, 309 U.S. 323 (1940) 12

Conkling v. Turner, 883 F.2d 431 (5th Cir. 1989) 14, 16

Corporacion Insular de Seguros v. Garcia, 876 F.2d 254 (1st Cir. 1989) 39n

Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) 58

Eastland v. United Servicemen's Fund, 421 U.S. 491 (1975) . 27-28

Elkins v. United States, 364 U.S. 206 (1960) 20

Fisher v. United States, 425 U.S. 391 (1976) 47

Florida v. Rodriguez, 469 U.S. 1 (1984) (Stevens, J., dissenting) 20

Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985, 767 F.2d 26 (2d Cir. 1985) . . . 17

Gravel v. United States, 408 U.S. 606 (1972) 22

Haines v. Liggett Group, Inc., 975 F.2d 81 (3rd Cir. 1992) 43, 57

Hanna v. Plumer, 380 U.S. 460 (1965) 20

Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (2d Cir. 1970), *affirmed by an equally divided court*, 400 U.S. 348 (1971) 57

Harris v. United States, 413 F.2d 316 (9th Cir. 1969) 39n

In re Burlington Northern, Inc., 822 F.2d 518 (5th Cir. 1987), *cert. den.* 484 U.S. 1007 (1987) 53-54

In re Burlington Northern, Inc., 679 F.2d 762 (8th Cir. 1982) . 39n

In re Doe, 662 F.2d 1073 (4th Cir. 1981) 13n

In re Fink, 876 F.2d 84 (11th Cir. 1989) 59

In re Grand Jury (C. Schmidt & Sons), 619 F.2d 1022 (3d Cir. 1980) 39n

In re Grand Jury Investigation of Ocean Transportation, 604 F.2d 672 (D.C. Cir. 1979) . . . 41

In re Grand Jury Proceedings, 867 F.2d 562 (9th Cir. 1989), *cert. den.*, 493 U.S. 906, *rehearing den.* 493 U.S. 985 (1989) . 15, 39n

In re Grand Jury Proceedings (Cianfrani), 563 F.2d 577 (3d Cir. 1977) 23

In re Grand Jury Proceedings (Damore), 689 F.2d 1351 (11th Cir. 1982) 15, 17

In re Grand Jury Proceedings (Doe), 831 F.2d 222 (11th Cir. 1987) 15n

In re Grand Jury Proceedings (Fine), 641 F.2d 199 (5th Cir. 1981) 14, 18, 19

In re Grand Jury Proceedings (FMC Corporation), 604 F.2d 798 (3d Cir. 1979) 13

In re Grand Jury Proceedings -Gordon, 722 F.2d 303 (6th Cir. 1983) 14, 17

In re Grand Jury Proceedings (Katz), 623 F.2d 122 (2d Cir. 1980) 13

In re Grand Jury Proceedings (Malone), 655 F.2d 882 (8th Cir. 1981) 14, 17

In re Grand Jury Proceedings (Manges), 745 F.2d 1250 (9th Cir. 1984) 38n

In re Grand Jury Proceedings (Schofield), 721 F.2d 1221 (9th Cir. 1983) 15

In re Grand Jury Proceedings, Subpoena to Testify to Wine, 841 F.2d 230 (8th Cir. 1988) . . 14

In re Grand Jury Proceedings, Subpoena to Vargas, 723 F.2d 1461 (10th Cir. 1983), *cert. den.* 469 U.S 819 (1984) . . 15, 62

In re Grand Jury Subpoena 92-1 (SJ), 31 F.3d 826 (9th Cir. 1994) 14

In re Grand Jury Subpoena Issued to Bailin, 51 F.3d 203 (9th Cir. 1995) 1, 2a-19a

In re Grand Jury Subpoena Dated Dec. 10, 1987, 926 F.2d 847 (9th Cir. 1991) 16, 30

In re Grand Jury Subpoena Dated June 5, 1985, 825 F.2d 231 (9th Cir. 1987) 16, 30

In Re Grand Jury Subpoena (DeGuerin), 926 F.2d 1423 (5th Cir. 1991) 17n

In re Grand Jury Subpoena Duces Tecum, 769 F.2d 52 (2d Cir. 1985) 39n

In re Grand Jury Subpoena Served Upon Niren, 784 F.2d 939 (9th Cir. 1986) . . 16, 30, 31, 42

In re Grand Jury Subpoenas, April 1978, at Baltimore, 581 F.2d 1103 (4th Cir. 1978) 61

In Re Grand Jury Subpoenas Duces Tecum (Lahodny), 695 F.2d 363 (9th Cir. 1982) 13

In re International Systems & Controls Corp. Securities Litigation, 693 F.2d 1235 (5th Cir. 1982) 38n

In re Oberkoetter, 612 F.2d 15 (1st Cir. 1980) . . . 15, 16n, 19

In re Oswalt, 607 F.2d 645 (5th Cir. 1979) 61

In re Sealed Case, 655 F.2d 1298 (D.C.Cir. 1981) 15

In re Societe National Industrial Aerospatiale, 782 F.2d 120 (8th Cir. 1986), *vacated on other grounds*, 482 U.S. 522 (1987) 54-55

In re Special Grand Jury No. 81-1, 676 F.2d 1005 (4th Cir. 1982) . 14

In re Steinhardt Partners, L.P., 9 F.3d 230 (2d Cir. 1993) . . . 58

In re United States, 872 F.2d 472 (D.C.Cir. 1989), *cert. dism'd.* 493 U.S. 960 (1989) 59-60

In re von Bulow, 828 F.2d 94 (2d Cir. 1987) 41, 54

Iowa Beef Processors, Inc. v. Bagley, 601 F.2d 949 (9th Cir. 1979) 41, 55, 60

Klitzman, Klitzman and Gallagher v. Krut, 744 F.2d 955 (3d Cir. 1984) 44

Lampman v. United States District Court, 418 F.2d 215 (9th Cir. 1969), *cert. den.* 397 U.S. 919, 935 (1970) 51n

Mallory v. United States, 354 U.S. 449 (1957) 20

Matter of Grand Jury Subpoena, 569 N.E.2d 852 (Mass.App. 1991) 38n

Matter of International Horizons, Inc., 689 F.2d 996 (11th Cir. 1982) 38n

National Mortgage Equity Corp. Mortgage Pool Certificates Litigation, 857 F.2d 1238 (9th Cir. 1988) 23

National Super Spuds, Inc. v. New York Mercantile Exchange, 591 F.2d 174 (2d Cir. 1979) 16n, 39n, 42

Nixon v. Sirica, 487 F.2d 700 (D.C.Cir. 1973) 61

Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946) 32n

Perlman v. United States, 247 U.S. 7 (1918) i, 8, 9, 16, 17, ... 21, 22, 23, 24, ... 25, 28n, 38

Reisman v. Caplin, 375 U.S. 440 (1964) 22, 32-34

Schlagenhauf v. Holder, 379 U.S. 104 (1964) 54

Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985), *cert. den.*, 474 U.S. 903 (1985) 60

Trammel v. United States, 445 U.S. 40 (1980) 47

United States v. Davis, 1 F.3d 606 (7th Cir. 1993) 14

United States v. Jones, 696 F.2d 1069 (4th Cir. 1982) 13

United States v. Morton Salt Co., 338 U.S. 632 (1950) 32n

United States v. Nixon,
418 U.S. 683 (1974) 25

United States v. Nobles,
422 U.S. 225 (1975) 35-36

United States v. Powell,
379 U.S. 48 (1964) 32n

United States v. RMI Co., 599 F.2d
1183 (3d Cir. 1979) 61

United States v. Ryan,
402 U.S. 530 (1970) 12

United States v. United States
District Court, 717 F.2d 478
(9th Cir. 1983) 54

United States v. United States
District Court, 238 F.2d 713
(4th Cir. 1956), *cert. den.*
352 U.S. 981 (1957) 62

United States v. Victoria-21,
3 F.3d 571 (2d Cir. 1993) . . . 59

United States v. Zolin, 491 U.S.
554 (1989) 21-22

United States Dep't. of Energy
v. Brimmer, 776 F.2d 1554
(Em.App. 1985), *cert. den.*
475 U.S. 1045 (1986) 40, 60

Upjohn Co. v. United States,
449 U.S. 383 (1981) 44-49

Velsicol Chemical Corp. v.
Parsons, 561 F.2d 671
(7th Cir. 1977), *cert.*
denied, 401 U.S. 942
(1978) 14, 18-19

Westinghouse Electric Corp. v. Republic of Philippines, 951 F.2d 1414 (3d Cir. 1991) . . 59

Will v. United States, 389 U.S. 90 (1967) 52, 56n

Wm. T. Thompson Co. v. General Nutrition Corp., 671 F.2d 100 (3d Cir. 1982) 38n

STATUTES, REGULATIONS AND RULES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 5

28 U.S.C. § 1651 . . . . . i, 2, 8, 11

Cal. Bus. & Prof. Code § 5100(f) (Deerings 1993) 26n

Cal. Bus. & Prof. Code § 5101 (Deerings 1993) 26n

Cal. Bus. & Prof. Code § 6068(e) (Deerings 1993) 25-26

Cal. Code of Regulations tit. 16, § 54 26-27

Cal. Code of Regulations tit. 16, § 95.2 . . . . . 26n

Supreme Court Rule 10.1.(a) . . . 16, 21

OTHER AUTHORITIES

C.A. Wright, et al., 15B *Federal Practice and Procedure* § 3914.23 at 132-133 (2d ed. 1992) . . 55, 56

C.A. Wright, et al., 16 *Federal Practice and Procedure* § 3934 at 235 (1977) 56-57

C.A. Wright, et al., 16 *Federal Practice and Procedure* § 3935 at 246-251 (1977) 55

C.A. Wright, et al., 16 *Federal Practice and Procedure* § 3935 at 247-48 (1977) 52

J. Wigmore, 8 *Evidence* § 2290 (McNaughton rev. 1961) 47

R.L. Stern, et al., *Supreme Court Practice* § 4:15 at 191-92 (7th ed. 1993) 21

Petitioners, Edward Silva, Jr., Silva Harvesting, Inc., Ord & Norman, E.O.C. Ord, Inc., and Edward O.C. Ord,[1] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 2a-19a) is published at *In re Grand Jury Subpoena Issued to Bailin*, 51 F.3d 203 (9th Cir. 1995). The order of the Court of Appeals denying Petitioners' motion for rehearing (App., *infra*, 39a) is unreported. The opinions and orders of the District Court (App., *infra*, 20a-34a) are unreported.

JURISDICTION

The Ninth Circuit filed its opinion

---

[1] Silva Harvesting, Inc. and E.O.C. Ord, Inc. do not have any parent or subsidiary corporations or companies.

on March 28, 1995. App., *infra*, 3a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition is timely filed because it is being filed within 90 days of the Ninth Circuit's denial of Petitioners' motion for rehearing with suggestion for rehearing *en banc*, entered June 7, 1995. (App., *infra*, 39a).

STATUTORY PROVISION INVOLVED

The All Writs Act, 28 U.S.C. § 1651, provides, in pertinent part, that:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law."

STATEMENT

This case arises out of a criminal tax investigation of Petitioners, Edward Silva, Jr. and Silva Harvesting, Inc. (hereafter collectively the "Clients"), in which they are represented by Petitioners, Ord & Norman, E.O.C. Ord, Inc., a

professional law corporation, and Edward O.C. Ord, Attorney at Law (hereafter collectively "Ord").

On March 15, 1994, a grand jury subpoena was served on the Salinas, California outside, independent accounting firm of Bailin, Stanford & Lavorato, Inc. through Charles D. Bailin, a Certified Public Accountant (CPA) and a shareholder and officer of the firm. The firm and Bailin had previously worked as tax preparers for the Clients, and had been contractually retained by Ord in April 1992 to provide accounting and other assistance in defending the Clients against the IRS investigation. App., *infra*, 20a-23a. The subpoena called for the production of certain work papers and records of Bailin that had been prepared pursuant to Bailin's engagement by Ord. Specifically, the subpoena called for work papers and records concerning a cash

tracing project Bailin undertook at Ord's direction. The original impetus for the project came from a suggestion made by an Internal Revenue Service (IRS) agent that Bailin look into certain payments. App., *infra*, 23a-24a.

Approximately two years earlier, the IRS had began an administrative investigation of the Clients' tax returns for specific years. After being contacted by an IRS agent, Bailin recommended to the Clients that they hire a tax attorney to represent them in the IRS investigation. App., *infra*, 21a-22a. In April 1992, the Clients hired Ord to represent them. *Id.* at 22a. Ord then hired Bailin to assist in the representation. *Id.*

The Clients' case was formally referred to the IRS's Criminal Investigation Division for investigation of possible criminal tax violations. During this administrative criminal

investigation, Bailin was served with an IRS administrative summons to appear before an IRS Special Agent. He appeared, accompanied by Ord, but refused to answer some questions based on the assertion of the attorney-client and/or attorney work-product privileges. Instead of seeking an enforcement order for the IRS summons in District Court, the next year, the United States Attorney served the grand jury subpoena on Bailin, tracking the contents of the IRS summons.

A. The District Court Proceedings

Ord and the Clients jointly moved in the United States District Court for the Northern District of California to quash the subpoena based on claims of attorney-client and work-product privilege. The District Court had 28 U.S.C. § 1331 jurisdiction over this case. It held an evidentiary hearing on September 19, 1994. On September 21, 1994, the Court denied

the Petitioners' motion and ordered Bailin to comply with the subpoena. See App., *infra*, 20a-31a.

The District Court found that: (See App., *infra*, 20a-26a.)

(a) As of April 15, 1992, Bailin was employed by Ord as his sub-agent in the performance of his legal work for the Clients.

(b) After the IRS agent suggested that Bailin trace several cash payments in the corporate books, Bailin met with the agent and "pursuant to direction and control of his principal, Attorney Ord," disclosed that he could trace only two of the ten cash payments.

(c) Since "the search conducted by Bailin was initiated not by Ord but by the Internal Revenue Service ... it is extremely doubtful whether the results of Bailin's search" are covered by attorney-client privilege.

(d) Even if privilege were applicable, "the attorney-client privilege was waived by the disclosure made at Ord's direction on December 14, 1992."

(e) Since Bailin's inquiry was initiated by the IRS "and not by any inquiry germane to Ord's representation of Movants, the work product privilege never attached."

The District Court granted a temporary stay to allow application for a stay to the Court of Appeals. App., *infra*, 32a-34a. In the stay order, the issue of the *Perlman* doctrine was addressed, and the Court found that the Ninth Circuit's "current attorney" exception to *Perlman* did not apply because "[n]o case places non-attorney sub-agents of the attorney in [the category of current attorney]." App., *infra*, 33a.

B. Proceedings in the Court of Appeals

Petitioners filed a timely Notice of

Appeal with the United States Court of Appeals for the Ninth Circuit. On October 4, 1994, the Ninth Circuit issued an order granting a stay of the District Court's order pending appeal, denying the United States' motion to dismiss the appeal on jurisdictional grounds, and setting an expedited briefing schedule. App., *infra*, 34a-38a. The order specifically stated that "a substantial question" existed as to whether the appeal falls within the *Perlman* doctrine, and ordered the parties to brief the issue of its jurisdiction. *Id.*at 36a.[2]

Petitioners also filed a petition, under the All Writs Act (28 U.S.C. § 1651), for a writ of mandamus with the

---

[2] The United States in its reply brief in the Court of Appeals sought to sidestep the jurisdiction issue by urging the Court to take jurisdiction under the doctrine of "hypothetical jurisdiction." See App., *infra*, 16a-17a. The Ninth Circuit declined. *Id.* at 17a.

Ninth Circuit. App., *infra*, 5a. The direct appeal and the writ petition were consolidated and oral argument was held regarding both the appeal and the writ petition. The Ninth Circuit filed its opinion on March 28, 1995. App., *infra*, 2a-19a.

The Ninth Circuit dismissed the appeal for lack of subject matter jurisdiction, and also denied the petition for a writ. App., *infra*, 3a, 6a. The Ninth Circuit acknowledged that an exception to the rule that the denial of a motion to quash a grand jury subpoena is a nonappealable, interlocutory order exists where the subpoena is directed to a third party who cannot be expected to risk a contempt citation in order to preserve the movant's right to appeal. App., *infra*, 11a, citing *Perlman v. United States*, 247 U.S. 7 (1918).

The Court then applied an exception

to the *Perlman* doctrine that it had sometimes applied to third parties who are participants in the confidential relationship on which the movant's claim of privilege is based, and over which the movant can be expected to exercise control. App., *infra*, 11a-14a. The Court had previously applied this exception to the narrow circumstance of an attorney who is currently representing the movant. *Id.* at 11a-12a.

The Court's opinion extended this exception, for the first time, **to non-attorney agents** (independent contractors) hired by an attorney to assist him or her in performing the legal defense work in a particular case. App., *infra*, 14a-16a. The opinion states that the appealability of such an order where the subpoenaed party is a non-attorney agent is a question of first impression in the circuit. App., *infra*, 10a. Specifically,

the Court found that because the accounting firm and the CPAs within it were brought under the umbrella of privilege through their retention by Ord, they *ipso facto* have the same legal duties and obligations of the attorney to commit contempt to protect the privileged relationship. App., *infra*, 15a. It also rejected the use of the All Writs Act (28 U.S.C. § 1651) to review the validity of this invasion of privilege and "as a means to avoid the final judgment rule in the context of motions to quash grand jury subpoenas." App., *infra*, 18a. The Court also found that there was no "usurption of power." *Id.* Petitioners filed a timely motion for rehearing with suggestion for rehearing *en banc*, which was denied on June 7, 1995. App., *infra*, 39a.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Clearly Conflicts with Decisions of Other Circuits. Procedures For Appellate Review

of the Invasion of Privilege by Grand Juries Must Be Uniform Among the Circuits.

Appeal from a denial of a motion to quash a grand jury subpoena typically does not lie until the person to whom the subpoena is directed has first resisted the order, committed, and been adjudged in contempt. *United States v. Ryan*, 402 U.S. 530 (1970); *Cobbledick v. United States*, 309 U.S. 323 (1940). This is because finality is a condition for appellate jurisdiction, *Cobbledick*, 309 U.S. at 324-25, and a denial of a motion to quash a grand jury subpoena is generally not considered a final, appealable order. *Ryan*, 402 U.S. at 532-33.

In *Ryan*, however, this Court recognized an exception to the finality rule for a "limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." 402 U.S. at 533.

With regard to this class of cases, the Ninth Circuit explained in *In Re Grand Jury Subpoenas Duces Tecum (Lahodny)*, 695 F.2d 363, 365 (9th Cir. 1982) that:

> "[A]n immediate appeal is proper when the subpoena is directed to a third party ... because that party normally will not be expected to risk a contempt citation but will instead surrender the sought-after information, thereby precluding effective appellate review at a later stage." (emphasis added.)

This rule and rationale has been followed with regard to attorneys in many federal circuits. See, *e.g.*, *In re Grand Jury Proceedings (Katz)*, 623 F.2d 122, 124-25 (2d Cir. 1980); *In re Grand Jury Proceedings (FMC Corporation)*, 604 F.2d 798, 800-01 (3d Cir. 1979); *United States v. Jones*, 696 F.2d 1069 (4th Cir. 1982);[3]

---

[3] See also, *In re Doe*, 662 F.2d 1073, 1076 (4th Cir. 1981), in which the Fourth Circuit allowed an attorney/grand jury target to immediately appeal the denial of his motion to quash a grand jury subpoena directed to his law partnership in order to preserve his assertion of the attorney

In re Special Grand Jury No. 81-1, 676 F.2d 1005, 1008 (4th Cir. 1982) (stating that the vast majority of circuits have allowed appeals of orders involving grand jury subpoenas to attorneys); *Conkling v. Turner*, 883 F.2d 431, 433-34 (5th Cir. 1989); *In re Grand Jury Proceedings (Fine)*, 641 F.2d 199, 201-03 (5th Cir. 1981); *In re Grand Jury Proceedings-Gordon*, 722 F.2d 303, 305-07 (6th Cir. 1983); *United States v. Davis*, 1 F.3d 606, 607 (7th Cir. 1993); *Velsicol Chemical Corp. v. Parsons*, 561 F.2d 671, 673-74 (7th Cir. 1977), *cert. denied*, 401 U.S. 942 (1978); *In re Grand Jury Proceedings, Subpoena to Testify to Wine*, 841 F.2d 230, 232-33 (8th Cir. 1988); *In re Grand Jury Proceedings (Malone)*, 655 F.2d 882, 884-85 (8th Cir. 1981); *In re Grand Jury Subpoena 92-1 (SJ)*, 31 F.3d 826 (9th Cir. 1994); *In*

---

work product doctrine.

re Grand Jury Proceedings, 867 F.2d 562, 564 (9th Cir. 1989), *cert. den.*, 493 U.S. 906, *rehearing den.* 493 U.S. 985 (1989); *In re Grand Jury Proceedings (Schofield)*, 721 F.2d 1221, 1222 (9th Cir. 1983); *In re Grand Jury Proceedings (Damore)*, 689 F.2d 1351, 1352 (11th Cir. 1982).[4]

At least three circuits do not permit clients to take immediate appeals from orders compelling testimony or documents from their attorneys. See *In re Sealed Case*, 655 F.2d 1298, 1300-02 (D.C.Cir. 1981); *In re Oberkoetter*, 612 F.2d 15, 16-18 (1st Cir. 1980); *In re Grand Jury Proceedings, Subpoena to Vargas*, 723 F.2d 1461, 1464-66 (10th Cir. 1983), *cert. den.* 469 U.S 819 (1984). Resolving this

---

[4] This case may have been overruled by the Eleventh Circuit's later decision in *In re Grand Jury Proceedings (Doe)*, 831 F.2d 222 (11th Cir. 1987). However, it is doubtful that *Doe* overruled *Damore* because *Doe* involved a subpoena *ad testificandum* and *Damore* involved a subpoena *duces tecum*.

fundamental conflict between the circuits, standing alone, requires granting certiorari.[5] See Supreme Court Rule 10.1.(a).

The Ninth Circuit appears to sometimes make a distinction between current and former attorneys for the purposes of applying the *Perlman* doctrine. See *In re Grand Jury Subpoena Served Upon Niren*, 784 F.2d 939 (9th Cir. 1986); *In re Grand Jury Subpoena Dated June 5, 1985*, 825 F.2d 231 (9th Cir. 1987); *In re Grand Jury Subpoena Dated Dec. 10, 1987*, 926 F.2d 847 (9th Cir. 1991). Other Circuits have not made this distinction. See, *e.g.*, *Conkling v. Turner*, 883 F.2d 431, 433-34 (5th Cir. 1988) (holding that,

---

[5] Moreover, the First Circuit in *Oberkoetter* (612 F.2d at 16-18) and the Second Circuit in *National Super Spuds, Inc. v. New York Mercantile Exchange*, 591 F.2d 174, 181 (2d Cir. 1979), both questioned the soundness of the *Perlman* doctrine, exhibiting an even deeper conflict in this area.

under *Perlman*, a district court's order directing a party's present and former attorneys to submit to limited depositions was a final, appealable order)[6]; *Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985*, 767 F.2d 26, 29 (2d Cir. 1985); *In re Grand Jury Proceedings-Gordon*, 722 F.2d at 305-07 (6th Cir. 1983) (present attorney in grand jury proceeding investigating possible tax crimes); *In re Grand Jury Proceedings (Malone)*, 655 F.2d 882, 884-85 (8th Cir. 1981); *In re Grand Jury Proceedings (Damore)*, 689 F.2d 1351, 1352 (11th Cir. 1982) (appears to be present attorney).

The distinction between former and

---

[6] See also, *In Re Grand Jury Subpoena (DeGuerin)*, 926 F.2d 1423, 1429-30 & n. 4 (5th Cir. 1991), where the Fifth Circuit stated that the denial of a motion to quash a subpoena issued to the present attorney of a criminal defendant was immediately appealable, but dismissed the appeal as moot because the district court denied the government's motion to hold the attorney in contempt.

present attorneys is an unwarranted exception to the *Perlman* doctrine, and is violative of common sense. As the Fifth Circuit observed:

> "We suspect that the willingness of a lawyer to protect a client's privilege in the face of a contempt citation will vary greatly, and have a direct relationship to the value of the client's business and the power of the client in relation to the attorney. We are reluctant to pin the appealability of a district court order upon such precarious considerations.
>
> * * * * *
>
> Although we cannot not say that attorneys in general are more or less likely to submit to a contempt citation rather than violate a client's confidence, we can say without reservation that some significant number of client-intervenors might find themselves denied all meaningful appeal by attorneys unwilling to make such a sacrifice. That serious consequence is enough to justify a holding that a client-intervenor may appeal an order compelling testimony from the client's attorney."

In re Grand Jury Proceedings (Fine), 641 F.2d 199, 202-03 (5th Cir. 1981) (footnote omitted; emphasis added). For similar reasoning, see *Velsicol Chemical Corp. v.*

Parsons, 561 F.2d 671, 674 (7th Cir. 1977), stating that "[i]t is one thing, however, for a lawyer to invoke the (attorney-client) privilege when called to testify...and quite another to expect an attorney to defy a court order directing him to testify," (emphasis added) and that the subpoenaed attorney should not be expected to resist the court's order compelling him to testify.

The Fifth Circuit in *Fine* also disagreed with the First Circuit's reasoning in *Oberkoetter, supra*, 612 F.2d at 18, that a "stouthearted" attorney might be willing to risk a contempt citation to protect his client's interest. See 641 F.2d at 202. As discussed below, a non-attorney, independent contractor accounting firm working on a single-shot engagement is not going to commit contempt and the right of the client to appeal should not turn on such precarious

considerations. However, such a "precarious consideration" is central to the Ninth Circuit's decision.

One of this Court's functions is to supervise lower federal courts. Justice Stevens has observed that;

> "As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation."

Florida v. Rodriguez, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting).

This supervisory role has been voiced as a ground in granting certiorari. See, for example, *Mallory v. United States*, 354 U.S. 449, 450 (1957); *Elkins v. United States*, 364 U.S. 206, 208 (1960) (certiorari granted to consider a "question of importance for the administration of federal justice"); *Hanna v. Plumer*, 380 U.S. 460, 463 (1965) (granting certiorari because of the

"threat to the goal of uniformity of federal procedure posed by the decision below"). Supreme Court Rule 10.1.(a) also recognizes the appropriateness of granting certiorari in this type of case. See R.L. Stern, et al., *Supreme Court Practice* § 4:15 at 191-92 (7th ed. 1993).

This case involves an important question of federal appellate jurisdiction under a rule that was established by a decision of this Court. Thus, given the non-uniformity of the application of the *Perlman* doctrine among the circuits, this Court should grant the writ and establish a uniform rule among the circuits for the pre-disclosure appellate review of validly-asserted privileges. This Court has recognized the importance of, and has gone to great pains to establish, uniform procedures in situations where privileged communications and documents are affected. See, for example, *United States v. Zolin*,

491 U.S. 554 (1989), establishing uniform procedures for invasion of the attorney-client privilege where the crime/fraud exception to the privilege is raised. Also see, *Reisman v. Caplin*, 375 U.S. 440 (1964), creating the due process procedures for IRS administrative summonses, including the right of the taxpayer to intervene to assert privileges when the accounting firm's workpapers were summoned and that the summons enforcement order is a final, appealable order, i.e. a uniform pre-disclosure appellate review procedures. See below for further discussion.

This Court, and some circuit courts of appeals, have recognized that the *Perlman* doctrine applies to appeals involving subpoenas and orders to produce documents in grand jury proceedings. See *Gravel v. United States*, 408 U.S. 606, 608 n.1 (1972) (U.S. Senator was allowed to

intervene in district court proceedings to quash subpoena issued to his assistant, and was allowed to appeal denial of his motion to quash under the *Perlman* doctrine; this Court noted that the government did not challenge the propriety of the appeal and that the Senator might be powerless to avert damage if not permitted to appeal). See also, *In re Grand Jury Proceedings (Cianfrani)*, 563 F.2d 577, 580 (3d Cir. 1977) (similar facts to *Gravel*); *National Mortgage Equity Corp. Mortgage Pool Certificates Litigation*, 857 F.2d 1238, 1240 (9th Cir. 1988) (stating that "the reason for allowing review of such orders in the grand jury context is that there are aspects of independence from the main course of any prosecution that render the order collateral"). This certainly applies to validly-asserted privileges, which once disclosed will be lost forever.

II. The Decision of the Court of Appeals Was Erroneous and Violates *Perlman* and other Decisions of this Court.

In *Perlman* (247 U.S. 7 (1918)), documents belonging to Perlman and his corporation were impounded by a district court clerk in an unrelated civil case. The United States Attorney instituted grand jury proceedings against Perlman and requested that the documents be turned over to him. The District Court so ordered. Perlman challenged the order and the United States argued on appeal that the order was not final. 247 U.S. at 12-13. This Court rejected that argument, stating that it was unable to concur that Perlman, although powerless to avert the mischief of the order, must accept its incidence and seek a remedy at some other time and in some other way. Thus, the District Court's order was immediately appealable. *Id.* at 13.

This Court affirmed the *Perlman*

doctrine's vitality of in *United States v. Nixon*, 418 U.S. 683, 691 (1974). See also, *Church of Scientology v. United States*, ___ U.S. ___, ___, 113 S.Ct. 447, 452 n. 11, 121 L.Ed.2d 313 (1992), stating that "under the so-called Perlman doctrine,..., a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceedings to risk contempt by refusing compliance." (citation omitted.) This certainly applies to an independent accounting firm hired on a one-shot engagement. It will not commit contempt so an appeal can be brought.

In California, attorneys are required by law to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, or his or her client." Cal. Bus. & Prof. Code §

6068(e) (Deerings 1993). Accountants are in a different situation. They are under a mandatory, statutory duty to comply with subpoenas ordered enforced by a court under pain of license revocation and fines.[7] Cal. Code of Regulations tit. 16, § 54 requires that no information obtained by a licensee, in his or her professional capacity, concerning a client or a

---

[7] In California, an accountant who violates the regulation requiring disclosure of client materials pursuant to a court order could be subject to a number of disciplinary penalties. For instance, he or she could be subject to fines of $200 to $2000. Cal. Code Reg. tit. 16, § 95.2. An accountant could also be subject to suspension or revocation of a permit or certificate required for practice. Cal. Bus. & Prof. Code § 5100(f) (Deerings 1993). Violation of § 5100(f) could also result in fines of $500 to $2500. Cal. Code Reg. tit. 16, § 95.2. Moreover, the revocation or suspension of a partner's right to practice accountancy could result in the revocation, suspension, or refusal to renew the permit of an accountancy partnership. Cal. Bus. & Prof. Code § 5101 (Deerings 1993). For the sake of brevity, Petitioners are omitting discussion of what professional discipline can result from the criminal conviction of an accountant.

prospective client shall be disclosed without the permission of the client or prospective client, except for (a) disclosures made in compliance with a **subpoena or a summons enforceable by order of a court**; and (b) disclosures made in response to an official inquiry from a federal or state regulatory agency.

Thus, the Ninth Circuit incorrectly required the accounting firm to commit contempt in order to obtain review of the District Court's order. The Ninth Circuit is essentially counseling accountants to break the law. It is clear that the accounting firm squarely falls within the *Perlman* rule and the District Court's order is final and appealable.

Instructive on the issue of whether a third-party witness should be expected to commit contempt is this Court's opinion in *Eastland v. United Servicemen's Fund*, 421 U.S. 491, 501 n.14 (1975), noting that the

Court of Appeals for the District of Columbia had properly distinguished between a subpoena that seeks information directly from a party and one that seeks the same information from a third person. In the former case, the party can resist and test the subpoena; but in the latter, compliance by the third person could frustrate any judicial review.[8]

In opposition to Petitioners' motion for a stay in the District Court, the United States cited three Ninth Circuit cases it argued held that where the third party subpoena is issued to the current attorney of a grand jury target, the attorney, because of his or her

---

[8] See also, J. Marshall's concurrence in that opinion, 421 U.S. at 514, in which he cites *Perlman* and states that the district court properly entertained the action in order to provide a forum in which the respondent could assert its constitutional objections to the subpoena, since "a neutral third party could not be expected to resist the subpoena by placing itself in contempt."

relationship to the client/target, should be willing to commit contempt in order to create a final, appealable order. See citations, *supra*, at 16. The United States argued that these cases, by analogy, applied to the instant situation and supported its position that the order in this matter was not final for purposes of appeal.

In granting Petitioners' request for a temporary stay, however, the District Court noted that these cases were distinguishable from this case because they "find current attorneys of the person asserting the privilege to be persons expected to risk a contempt citation ... No case cited places non-attorney sub-agents of the attorney in that category." App., *infra*, 33a (emphasis added). This is correct. Bailin and his firm are third party independent accountants under a limited engagement that does not include

agreeing to commit contempt and go to jail so that Petitioners can appeal. There is no evidence in the record to the contrary. Moreover, no independent, third party CPA in his or her right mind would agree in advance to such a condition as part of an engagement. In fact, such an agreement would violate California law and would be a void, unenforceable contract,

Analysis of the cases cited by the United States reveals clear distinctions between them and the instant case. See *In re Grand Jury Subpoena Served Upon Niren, supra*, 784 F.2d 939; *In re Grand Jury Subpoena Dated June 5, 1985, supra*, 825 F.2d 231; *In re Grand Jury Subpoena Dated Dec. 10, 1987, supra*, 926 F.2d 847. This narrow carve-out of the *Perlman* doctrine for current attorneys is inapplicable to the facts of this case because Bailin is not the target's attorney, he is an independent contractor hired by the

attorney for the instant investigation. None of these cases involves a similar or analogous situation.

In *Niren*, for example, the attorney-witness was in-house counsel to the grand jury target. Therefore, the attorney was the equivalent of a common-law employee of the target and under the target's control. In fact, The Ninth Circuit analogized Niren's situation to that of an employee in making its holding. 784 F.2d at 940-941. This case presents a different situation. The witness is an independent contractor CPA hired to perform specific duties for the attorney on a one-shot basis. The level of control exercised by Petitioners is not even close to the level of control exercised by an employer over a common-law employee, such as the in-house counsel in *Niren*. The other two case are equally inapplicable.

Authority for the appealability of

the District Court's order may also be found in this Court's decision in *Reisman v. Caplin, supra*, 375 U.S. 440. In *Reisman*, the IRS was seeking to subpoena the workpapers of an accounting firm that had been hired by an attorney to work with him in the defense of his client in ongoing criminal and civil tax matters. The accounting firm was served with the equivalent of a grand jury subpoena--an administrative summons to appear before an IRS Special Agent.[9] *Id.* at 443-444. The attorney tried to intervene and object to the compliance with the summons. The District Court ordered enforcement of the

---

[9] In *United States v. Powell*, 379 U.S. 48, 57 (1964), this Court held that an IRS administrative summons is the legal equivalent of a grand jury subpoena, and the same rules apply. *Powell* relied on prior decisions of this Court involving summonses issued by other governmental agencies holding that this type of process is the same as a grand jury subpoena. See *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946).

IRS summons against the accountant. This Court ruled that any person affected by the disclosures or production could intervene and raise objections on any appropriate ground, including privilege. This Court also ruled that the order compelling compliance by the accountant was a final appealable order. *Id.* at 449.

The instant case is factually and procedurally the same as *Reisman*. As in *Reisman*, the IRS is conducting a criminal investigation here. The attorney in *Reisman*, as in this case, hired an independent accounting firm to assist in the defense of the tax investigation. The instant dispute started with an IRS summons seeking the very information now sought by the grand jury subpoena. Petitioners intervened at the administrative level and asserted privileges as expressly authorized by *Reisman*.

The United States, however, did not seek enforcement of the IRS summons in the District Court. It issued a grand jury subpoena, which is the legal equivalent of an IRS summons. See fn. 9, *supra*. Petitioners moved to intervene in the District Court and to assert again their privilege objections. Thus, *Reisman* compels the same result in this case--an immediate appeal of the privilege issues. The United States should not be allowed to avoid enforcement of the administrative summons by issuing a grand jury subpoena, and thus to deprive Petitioners of the opportunity to test the legality of the order to the accountant to turn over the proven-privileged documents that they clearly would have had under *Reisman* if the United States had sought enforcement of the original summons. The Ninth Circuit's opinion ignores this dispositive case, because it cannot distinguish it.

It is important to note that a grand jury subpoena and an IRS summons end up in the same place for enforcement--the District Court using its powers via a court order to compel compliance. It is this enforcement order that is appealed. So it should make no difference for purposes of appellate jurisdiction if the order enforces a grand jury subpoena or its legal equivalent--an IRS summons.

III. The Decision of the Court of Appeals Poses Serious Consequences for the Criminal Justice System, and the Legal and Accounting Professions, Because it, Practically Speaking, Allows the United States to Invade Validly-Established Communicative and Work-Product Privileges Prior to any Appellate Review, Thus Prejudicing the Defendant's Right to Counsel and the Preparation of a Defense.

In *United States v. Nobles*, 422 U.S. 225, 238 (1975), this Court observed that "[o]ne of those realities [of litigation in our adversary system] is that attorneys must often rely on the assistance of investigators and other agents in the

compilation of materials in preparation for trial." Since 1975, this statement has come to even more accurately describe the modern practice of law. As our world becomes more complicated, the less able attorneys are to investigate the facts of a case and prepare for trial by themselves. In many litigations, large and small, a cadre of independent contractors assist the attorney to understand the facts and prepare for trial or settlement negotiations. Most of these agents are independent contractors.

The Ninth Circuit's opinion creates a dangerous precedent because attorneys will be less willing to hire needed outside personnel, such as accountants and other investigators. Also, independent contractor agents will be less willing to accept litigation support work. If the independent contractor agent is subpoenaed to testify about his or her work for the

attorney, the opposing party (i.e., the United States) will be able to invade privilege and to secure privileged documents and communications. This is true because few independent contractors will be willing to commit contempt, and suffer fines, jail or license revocation, in order to preserve the attorney's and the client's appeal rights. This, in turn, denies a defendant the needed technical help in defense of a criminal investigation.

As discussed above (see pp. 13-16), the circuits are undecided as to whether an attorney, who has an obligation to protect his or her client's confidences at his or her own risk, should be willing to disobey a court order to disclose privileged material. Common sense dictates that other professionals, such as accountants, who do not have the same professional obligations to maintain

client confidences (see fn. 7, *ante*), will be even less willing to risk contempt by disobeying a court order to disclose privileged material. As the Fifth Circuit has noted, *supra* at 18, appealability of such orders should not turn on such a "capricious circumstance."

This is further demonstrated by the fact that the *Perlman* doctrine has been applied to non-attorney third-party record keepers. This includes accountants and accounting firms,[10] medical

---

[10] See, for example, *Wm. T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 102-03 (3d Cir. 1982); *In re Grand Jury Proceedings (Manges)*, 745 F.2d 1250, 1251 n.2 (9th Cir. 1984); *In re International Systems & Controls Corp. Securities Litigation*, 693 F.2d 1235, 1238 n.1 (5th Cir. 1982); *Matter of International Horizons, Inc.*, 689 F.2d 996, 1000-02 & n. 11 (11th Cir. 1982). But see, *Matter of Grand Jury Subpoena*, 569 N.E.2d 852, 854 (Mass.App. 1991), declining to apply the *Perlman* doctrine to an independent accounting firm.

professionals,[11] corporate employees,[12] banks,[13] and governmental agencies.[14] Thus, the Court of Appeals' opinion raises serious questions affecting more than the

---

[11] See *In re Grand Jury Proceedings*, 867 F.2d 562, 564 (9th Cir. 1989), *cert. den.*, 493 U.S. 906, *rehearing den.* 493 U.S. 985 (1989) (grand jury target could appeal an order denying motions to quash subpoenas issued to her psychiatrist and two hospitals).

[12] See, e.g., *In re Grand Jury Subpoena Duces Tecum*, 769 F.2d 52, 54-56 (2d Cir. 1985); *In re Grand Jury (C. Schmidt & Sons)*, 619 F.2d 1022, 1024-25 (3d Cir. 1980). But see, *Corporacion Insular de Seguros v. Garcia*, 876 F.2d 254, 258-60 (1st Cir. 1989); *In re Burlington Northern, Inc.*, 679 F.2d 762, 767-68 (8th Cir. 1982); *National Super Spuds v. New York Mercantile Exchange*, 591 F.2d 174 (2d Cir. 1979), all holding that employees could be expected to risk contempt to secure appellate review of their employer's claim of privilege. This is yet another example of the confusion surrounding the scope of the *Perlman* doctrine and how the circuits are split over many aspects of its application.

[13] *Harris v. United States*, 413 F.2d 316, 316-17 (9th Cir. 1969).

[14] *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1465-66 (11th Cir. 1984) (per curiam).

constitutional rights and immediate interests of the parties involved. All professionals who supply litigation support services are potentially affected.

Once, disclosure of privileged material has occurred, "the bell cannot be unrung." Thus, Bailin's compliance would moot, prejudice and waive the question of the application of the attorney-client and work-product privileges. See, e.g., *Admiral Ins. Co. v. United States District Court*, 881 F.2d 1486, 1491 (9th Cir. 1989) (granting prohibitive writ and citing the "irreparable harm a party likely will suffer if erroneously required to disclose privileged material or communications"); *United States Dep't. of Energy v. Brimmer*, 776 F.2d 1554, 1558-59 (Em.App. 1985), *cert. den.* 475 U.S. 1045 (1986) (stating that mandamus is appropriate to review substantial claims of privilege because review by later appeal cannot undo harm

done by disclosure); *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 955 fn. 7 (9th Cir. 1979) (stating that "disclosure of allegedly privileged or confidential information renders impossible any meaningful appellate review of claim of privilege or confidentiality"); *In re Grand Jury Investigation of Ocean Transportation*, 604 F.2d 672, 674 (D.C. Cir. 1979) (stating that without prior appellate review of claim of attorney-client privilege, party would be subjected to "the irreparable loss of its right to claim the attorney-client privilege"); *In re von Bulow*, 828 F.2d 94, 98 (2d Cir. 1987) (stating that compliance with discovery order against claim of privilege destroys the right sought to be protected.) Compliance with the District Court's order would clearly result in irreparable injury to the attorney-client relationship between Ord and the Clients.

The Ninth Circuit's decision is dangerous because it equates independent contractors with employees by invoking *National Super Spuds v. New York Mercantile Exchange*, 591 F.2d 174 (2d Cir. 1979), and other cases involving employees (including in-house counsel). See App., *infra*, at 4a. If Bailin, an independent contractor hired on a project-by-project basis, is the equivalent of the high ranking Commodity Futures Trading Commission official in *National Super Spuds*, or the in-house counsel in *Niren*, *supra*, at 31, any person hired to assist an attorney is placed in the same position as an employee of the attorney, or of the client. That Bailin and his firm had also been the Clients' tax preparer is of no import, because this past role was separate from their role as Ord's independent contractor.

The Ninth Circuit's opinion is also

dangerous because it has the potential to allow the United States to invade the attorney-client privilege and the attorney work-product doctrine with impunity. All the United States and the IRS need do is determine who assisted the attorney in preparing for litigation and subpoena that person before the grand jury, rather than using an administrative summons, the judicial enforcement of which results in a final appealable order. The witness will not commit contempt and suffer fines and jail to preserve the clients' and the attorneys' privileges and appeal rights.

This situation puts at risk decades of court decisions protecting the attorney-client privilege and the attorney work-product doctrine. It runs counter to federal courts' attempts to zealously protect documents within the scope of the attorney-client privilege. See *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3rd

Cir. 1992); *Klitzman, Klitzman and Gallagher v. Krut*, 744 F.2d 955, 960 (3d Cir. 1984). It also has ramifications for the right to counsel, because it could create an atmosphere of distrust between the client and the attorney and the attorney's agents.

For example, this Court held in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), a case with parallel, but less compelling, facts, that the attorney-client privilege covers information communicated to counsel by corporate employees for the purpose of enabling counsel "to give sound and informed advice" to the corporation. *Id.*, at 390. In *Upjohn*, private accountants did an internal audit and discovered possible illegal payments to foreign officials. Similarly, in this case, the impetus for the internal corporate investigation came from an outside source. The accountants

informed the corporation's general counsel, who conducted an internal investigation of these "questionable payments." Similarly, in this case, the company conducted an internal investigation into "questionable" cash payments. It is the work product of this investigation, conducted by the accounting firm hired by the attorney, that the United States seeks in this case.

During the investigation, Upjohn's general counsel and corporate employees generated communications and documentation. The investigation involved a questionnaire sent to all the corporation's "foreign general and area managers," and interviews with the recipients of the questionnaire and some 33 other Upjohn officers or employees.

Upjohn then made a public filing with the Securities and Exchange Commission in the form of a "preliminary" report

disclosing certain questionable payments. It simultaneously served a copy on the IRS. This triggered an investigation.

Just as in this case, the IRS issued an administrative summons seeking production of all the files, records, memoranda and notes underlying the corporation's internal investigation. In reviewing an appeal from the subsequent IRS summons enforcement order, this Court rejected the Sixth Circuit's limited view of the attorney-client privilege, opting for broad application of the privilege in order not to discourage persons in corporations from providing information and generating documents to pass on to corporate counsel. This allows corporations to receive proper advice during an ongoing investigation and to comply with the law on an ongoing basis. 449 U.S. at 390-93 & fn. 2.

In reaching its holding, this Court

recognized the importance of the attorney-client privilege to the public interest and to the administration of justice:

> "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage frank and full communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends of the lawyer's being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51 (1980): 'The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.' And in *Fisher v. United States*, 425 U.S. 464, 470 (1976), we recognized the purpose of the privilege to be 'to encourage clients to make full disclosure to their attorneys.'" 449 U.S. at 389. (emphasis added.)

This Court also held that counsel's

notes and memoranda were work product based on oral statements of the witnesses. Where they revealed communications by witnesses, they were protected by the attorney-client privilege. 449 U.S. at 397-401. To the extent that the notes and memoranda do not reveal witness communications, they reveal counsel's mental processes in evaluating the communications, and thus were protected from disclosure by the attorney-work product doctrine. *Id.*

This Court also noted that the United States in *Upjohn* was not without recourse in the face of the company's valid assertions of privilege. It noted that the government was free to duplicate the company's investigation and question the employees who communicated with counsel. 449 U.S. at 396 (emphasis added). The United States in this appeal is also free to conduct its own investigation. It

should not be able to secure the privileged work product of an accounting firm hired by the corporate attorney by the simple expedient of subpoenaing the accountant, knowing that the firm will not and cannot commit contempt in order to preserve privileges belonging to the hiring attorney and his client. The Ninth Circuit's opinion could potentially allow the IRS to achieve this result and to circumvent this Court's rulings regarding the attorney-client and work-product privileges in *Upjohn* and other cases.

Finally, because the underlying factual pattern involves a common factual situation in IRS investigations--the IRS suggesting possible lines of inquiry for taxpayers--the District Court's decision will chill taxpayer cooperation in tax investigations. The District Court's opinion is revolutionary because it holds that an accountant and his firm working

for the attorney in an investigation are actually working for the IRS when answering an IRS agent's questions. Thus, neither the **work product** behind the answer nor the internal communications and advice behind answering the questions of the IRS agent are covered by privilege. When confronted with such a situation, many taxpayers will be unwilling to cooperate in any investigation. Voluntary cooperation in civil audits and litigation will greatly diminish. This is because in answering any question suggested or posed by the IRS, the taxpayer or his agents may be deemed to be working for the IRS and thus all communication and work product behind the answer would not covered be by the law of privilege. Thus, the District Court's opinion is clearly wrong, dangerous and should have been reviewed by the Court of Appeals, either through direct appeal or through a writ of

mandamus, see Part IV., *infra*.

IV. The Ninth Circuit's Denial of Petitioners' Petition for a Writ of Mandamus Conflicts with Other Circuits' Rulings Recognizing that Mandamus Is Appropriate to Review Validly-Asserted Privileges Prior to Compelled Disclosure.

The Ninth Circuit's denial of Petitioners' petition for a writ of mandamus focuses too narrowly on two older cases that denied writs of mandamus to review denials of motions to quash grand jury subpoenas,[15] and also ignores numerous later court decisions finding that mandamus is proper to review questions of privilege before disclosure of the privileged materials to avoid waiver of the privilege. Mandamus has also be used to review disputes arising in grand jury proceedings. The Ninth

---

[15] See App., *infra*, at 18a, citing *Lampman v. United States District Court*, 418 F.2d 215 (9th Cir. 1969), *cert. den.* 397 U.S. 919, 935 (1970) and *City of Los Angeles v. Williams*, 438 F.2d 522 (9th Cir. 1971).

Circuit's refusal to allow review by writ in this case illustrates the conflict among the circuits with regard to the application of mandamus to these areas.

Moreover, one case relied on by the Ninth Circuit used an unreasonably expansive reading of one of this Court's decisions to find that mandamus is not available to review denial of motions to quash grand jury subpoenas. *City of Los Angeles v. Williams*, 438 F.2d 522 (9th Cir. 1971), cited by the Ninth Circuit at App., *infra*, 18a-19a, hinged on the Ninth Circuit's erroneous reasoning that this Court's decision in *Will v. United States*, 389 U.S. 90 (1967) held that privilege does not enjoy a special status in considering a petition for an extraordinary writ. See 438 F.2d at 522-523. Not only do Petitioners not read *Will* as containing such a holding or even such an implied holding or dicta, later

cases (see discussion, *infra*) have shown that mandamus is particularly appropriate to review orders compelling disclosure of information claimed to be protected by the Constitution, privilege, or more general interests of society. See, generally, C.A. Wright, et al., *16 Federal Practice and Procedure* § 3935 at 247-48 (1977). Thus, the principle underpinning *Williams* and the Ninth Circuit's opinion, which relies on *Williams*, is based on too expansive a reading of *Will*. Certiorari is appropriate for this Court to determine the application of mandamus to court orders compelling disclosure of privileged materials and communications.

Many courts have found mandamus to be appropriate to secure appellate review of discovery orders involving important questions of law. See, for example, *In re Burlington Northern, Inc.*, 822 F.2d 518, 522 (5th Cir. 1987), *cert. den.* 484 U.S.

1007 (1987), stating that "[T]he difficulty of obtaining effective review of discovery orders, the serious injury that sometimes results from such orders, and the often recurring nature of discovery issues support use of mandamus in exceptional cases." See also, *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (mandamus proper to review novel question involving Federal Rules); *In re von Bulow*, 828 F.2d 94, 97 (2d Cir. 1987); *United States v. United States District Court*, 717 F.2d 478, 481-82 (9th Cir. 1983) (mandamus used to set aside order in criminal proceeding requiring the government to produce documents under the Freedom of Information Act); *In re Societe National Industrial Aerospatiale*, 782 F.2d 120, 123 (8th Cir. 1986), *vacated on other grounds*, 482 U.S. 522 (1987) ("mandamus is appropriate to provide guidelines for the resolution of novel and important

questions presented in the discovery order that are likely to recur"); *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 953-55 & fn. 7 (9th Cir. 1979) (stating that a rationale for invoking mandamus to review privilege questions is that "disclosure of allegedly privileged or confidential information renders impossible any meaningful appellate review of the claim of privilege or confidentiality"). See, generally, C.A. Wright, et al., 15B *Federal Practice and Procedure* § 3914.23 at 132-133 (2d ed. 1992), 16 *Federal Practice and Procedure* § 3935 at 246-251 (1977).

Orders regarding discovery matters are uniquely suited to mandamus review because they are generally considered to be interlocutory and non-appealable. See *City of Las Vegas v. Foley*, 747 F.2d 1294, 1296-97 (9th Cir. 1984). This is because the finality rule often prevents appellate

review of even oft-occurring discovery problems that plague district courts. See C.A. Wright, et al., 15B *Federal Practice and Procedure* § 3914.23 at 132-133 (2d ed. 1992). Thus, mandamus, because of its extraordinary and discretionary nature and its use in a supervisory or advisory role,[16] presents the most direct and advantageous way to provide appellate review of discovery orders when such review is needed. See C.A. Wright, et al., 16 *Federal Practice and Procedure* § 3934 at 235 (1977), stating that "[i]mportant questions of procedure are often difficult to review by appeal, and

---

[16] See *Will v. United States*, 389 U.S. at 107 (mandamus serves a "vital corrective and didactic function"). See also, C.A. Wright, et al., 16 *Federal Practice and Procedure* § 3934 at 235 (1977), wherein the authors state that the statements in *Will* "seem to reiterate the Court's acceptance of writ review...by which courts of appeals may supervise practice on issues that otherwise may elude prompt or effective appellate scrutiny."

at times may demand appellate intervention to secure uniformity between different judges, or simply bring the balancing perspective that appellate review is intended to provide in controlling the practice as well as the substantive decisions of trial courts."

Many courts have also found mandamus to be an appropriate remedy to deal with questions regarding the attorney-client privilege because "maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privilege communication is an inadequate remedy." *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (2d Cir. 1970), *affirmed by an equally divided court*, 400 U.S. 348 (1971). See also, *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 88-91 (3rd Cir. 1992); *Chase Manhatten Bank, N.A. v.*

Turner & Newhall, PLC, 964 F.2d 159, 163 (2d Cir. 1992); *Admiral Ins. Co. v. United States District Court*, 881 F.2d 1486, 1491 (9th Cir. 1989), and the cases cited therein; *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 606 (8th Cir. 1977) ("where a claim of attorney-client privilege has been raised in and rejected by a district court,... mandamus is available as a means of immediate appellate review"). Mandamus has also been held to be appropriate for review of orders requiring discovery of information claimed to be privileged under other theories or where other important interests are at stake, on the grounds that irreparable harm will occur if the information is disclosed. See, e.g., *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 233 (2d Cir. 1993) (question of whether work-product protection is waived by voluntary disclosure to government agency

presents "one of those rare circumstances permitting the use of mandamus to review a district court order"); *United States v. Victoria-21*, 3 F.3d 571, 575 (2d Cir. 1993); *Westinghouse Electric Corp. v. Republic of Philippines*, 951 F.2d 1414, 1422 (3d Cir. 1991) (mandamus found to be suitable means of reviewing order compelling discovery on ground that prior disclosure to different adversary had waived privileges); *In re Fink*, 876 F.2d 84 (11th Cir. 1989) ("[i]n the context of discovery orders which will compromise a claim of privilege or invasion of privacy rights, mandamus has been found appropriate due to the importance of the privilege, the seriousness of the injury if discovery is obtained, and the difficulty of obtaining effective review once the privileged information has been made public"); *In re United States*, 872 F.2d 472 (D.C.Cir. 1989), *cert. dism'd.*

493 U.S. 960 (1989) (mandamus was proper to review district court's determination that claim of state secrets privilege should be decided on item-by-item basis); *United States Dep't. of Energy v. Brimmer*, 776 F.2d 1554, 1558-59 (Em.App. 1985), *cert. den.* 475 U.S. 1045 (1986) (order to produce internal government documents, rejecting claim of governmental privilege, set aside by mandamus); *Sporck v. Peil*, 759 F.2d 312, 314-15 (3d Cir. 1985), *cert. den.*, 474 U.S. 903 (1985) (mandamus was appropriate to set aside an order to product a set of documents selected by counsel to prepare for deposition; the work product questions presented invoked mandamus' instructional goals and discharge of the court's supervisory function); *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984); *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 953-54 (9th Cir. 1979), and the cases

cited therein.

Because of its appropriateness for review of discovery orders and orders affecting privilege, a number of circuit courts of appeals have used mandamus to review orders involving grand jury disputes. See, for example, *In re Oswalt*, 607 F.2d 645, 648 (5th Cir. 1979) (mandamus issued to correct order that authorized direct seizure of documents subpoenaed by grand jury); *United States v. RMI Co.*, 599 F.2d 1183, 1185-87 (3d Cir. 1979) (mandamus was proper method to challenge district court's refusal to consider request for protective order against disclosure of documents that non-party produced before grand jury); *In re Grand Jury Subpoenas, April 1978, at Baltimore*, 581 F.2d 1103, 1106-1110 (4th Cir. 1978); *Nixon v. Sirica*, 487 F.2d 700, 707 (D.C.Cir. 1973) (mandamus used to review propriety of district court order

to produce allegedly-privileged documents *in camera*); *United States v. United States District Court*, 238 F.2d 713 (4th Cir. 1956), *cert. den.* 352 U.S. 981 (1957) (holding that courts of appeals may grant relief by way of writ of mandamus to order a district court to vacate an order quashing a subpoena for production of records before a grand jury).

One Circuit has even commented that mandamus would be an appropriate route for clients seeking to challenge a District Court's denial of their motion to quash a grand jury subpoena without having to wait for a contempt citation. See *In re Grand Jury Proceedings, Subpoena to Vargas*, *supra*, 723 F.2d at 1464-66.

Mandamus is an appropriate avenue to assure that important questions of privilege arising in the grand jury context are reviewed by appellate courts prior to court-enforced disclosure of the

privileged materials or communications. This avoids waiver of privileges and allows early resolution of privilege questions without the necessity of proceeding through a criminal prosecution before the questions can be heard by the appellate court.

CONCLUSION

This Court must establish a uniform procedure for the pre-disclosure appellate review of validly-asserted privileges, either through appeal by right or by writ. For all the reasons given above, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

EDWARD O.C. ORD
Counsel of Record
ORD & NORMAN
650 California Street,
26th Floor
San Francisco, CA 94108
415/274-3800
Counsel for Petitioners

June 1995

APPENDIX

1. Opinion of Court of Appeals

2. District Court Memorandum of Decision and other Orders

3. Initial Stay Order by Court of Appeals

4. Court of Appeals Denial of Rehearing

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: GRAND JURY SUBPOENA ISSUED TO CHARLES D. BAILIN	
EDWARD SILVA, JR.; SILVA HARVESTING INC.; EDWARD O.C. ORD, INC.; ORD & NORMAN, Appellants, v. UNITED STATES OF AMERICA, Appellee.	No. 94-16684 D.C. No. CV-94-7008-WAI
EDWARD SILVA, JR., an individual; SILVA HARVESTING INC.; et al., Petitioners, v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, Respondent, UNITED STATES OF AMERICA,	No. 94-70757 D.C. No. CV-94-7008-MISC **OPINION**

Real Party)
in Interest.)

Appeal from the
United States District Court
for the Northern District of California
William A. Ingram, Chief Judge, Presiding

Argued and Submitted
December 12, 1994
San Francisco, California

Filed March 28, 1995

Before: J. Clifford Wallace,
Chief Judge; Harry Pregerson
and Robert R. Beezer, Circuit Judges.

Opinion by Judge Beezer

SUMMARY

**Criminal Law
and Procedure/Discovery/Appeals**

The court of appeals dismissed an appeal and denied a petition. The court held that it lacked jurisdiction over an appeal of the district court's denial of a motion to quash a grand jury subpoena directed at the movant's tax accountant.

The Internal Revenue Service (IRS) investigated cash payments received by

appellant Edward Silva, Jr. Silva retained an attorney in connection with the investigation. The attorney retained Charles Bailin, Silva's tax accountant, to aid him in representing Silva.

An IRS agent met with Bailin and gave him a list of cash transactions which she stated had been paid to Silva's company. She requested that Bailin trace the payments into Silva's records to determine whether they had been reported as income. Bailin did the investigation.

A criminal investigation ensued. The United States Attorney initiated a grand jury investigation. The grand jury issued a subpoena duces tecum to Bailin demanding production of all of his workpapers relating to the cash tracing and all of his notes of his conversations with the IRS agent, Silva and Silva's employees relating to the investigation.

Silva filed a motion to quash the

subpoena directed at allegedly privileged records of Bailin. The district court denied the motion.

Silva appealed. Silva also attempted to obtain review of the district court's ruling through a petition for an extraordinary writ under the All Writs Act. The government moved to dismiss the appeal for lack of jurisdiction.

[1] The order at issue in this case was not appealable. [2] Generally, the denial of a motion to quash a subpoena is a nonappealable interlocutory order. There is a narrow exception to this rule where the subpoena is directed at a third party who "cannot be expected to risk a contempt citation" in order to preserve the movant's right to appeal. [3] The exception did not apply in this case. Bailin was retained by Silva's attorney to represent Silva in a confidential, fiduciary capacity. He has remained

Silva's agent throughout the proceedings and is, therefore, subject to Silva's control to some degree. More importantly, Bailin is necessarily a party to the relationship upon which Silva's entire claim of privilege is based. In such circumstances, a third party *can* be expected to risk contempt in order to protect the privileged relationship. [4] It did not matter that Bailin is an accountant rather than an attorney.

[5] This case was not an appropriate one in which to apply the doctrine of "hypothetical jurisdiction." The government's own argument revealed that resolving the appeal on the merits, rather than dismissing it for lack of jurisdiction, would affect the outcome.

[6] Silva's petition for review of the district court's order by extraordinary writ also failed. The Ninth circuit has rejected attempts to use the

All Writs Act as a means of avoiding the final judgment rule in the context of motions to quash grand jury subpoenas. [7] There was no judicial "usurpation of power" in this case.

COUNSEL

Edward O.C. Ord, Ord & Norman, San Francisco, California, for the appellants-petitioners.

Leo P. Cunningham and Daniel Graber, Assistant United States Attorneys, San Jose, California, for the appellee-real party in interest.

OPINION

BEEZER, Circuit Judge:

Edward Silva, Silva Harvesting Inc. (collectively "Silva"), Edward O.C. Ord, Inc. and Ord & Norman appeal the district court's denial of their motion to quash a grand jury subpoena duces tecum directed

at allegedly privileged records of Charles Bailin, Silva's tax accountant. Silva also attempts to obtain review of the district court's ruling through a petition for an extraordinary writ under the All Writs Act, 28 U.S.C. § 1651. We dismiss the appeal for lack of subject matter jurisdiction and deny the petition.

I

Bailin has been Silva's tax accountant for several years. In mid-1992, Bailin became aware that an agent of the Internal Revenue Service ("IRS"), Elizabeth Davis, was investigating a large number of cash payments received by Silva. Bailin recommended to Silva that Silva retain attorney Edward O.C. Ord in connection with the investigation, which Silva did in April 1992. Shortly thereafter, Ord retained Bailin to aid him in representing Silva in the investigation. Bailin testified that all

actions he took after Ord was retained were at Ord's direction. The district court found that Bailin was Ord's agent at all times relevant to these proceedings.

In July 1992, Davis met with Bailin and gave him a list of ten cash transactions which she stated had been paid to Silva Harvesting. She requested that Bailin trace the payments into Silva's records to determine whether they had been reported as income. She candidly informed Bailin that she suspected Silva of using the cash illegally. Bailin did the investigation, and apparently could not trace all of the payments into Silva's books. Bailin revealed this fact to Davis at Ord's direction.

A criminal investigation ensued, and eventually the United States Attorney initiated a grand jury investigation. The grand jury issued a subpoena duces tecum to Bailin demanding production, among

other things, of all of his workpapers relating to the cash tracing, and all of his notes of his conversations with Davis, Silva and Silva's employees relating to the investigation. Silva initiated the instant action in response to the subpoena.

The district court denied Silva's motion to quash the subpoena. The United States moved to dismiss the appeal for lack of jurisdiction.

II

[1] Silva contends that the district court's denial of the motion to quash the subpoena is appealable because Bailin was a "third party." The appealability of such an order where the subpoenaed party is a nonattorney agent of the movant is a question of first impression in this circuit. We hold that the order at issue here is not appealable.

A

[2] Generally, the denial of a motion to quash a subpoena is a nonappealable interlocutory order. *United States v. Ryan*, 402 U.S. 530, 532-33 (1971). In order to appeal the order, the person subpoenaed must refuse to comply and contest the validity of the subpoena by appealing a contempt determination. *Id.* There is, however, a narrow exception to this rule where the subpoena is directed at a third party who "cannot be expected to risk a contempt citation" in order to preserve the movant's right to appeal. *In re Grand Jury Subpoena Served Upon Niren*, 784 F.2d 939, 941 (9th Cir. 1986) (citing *Perlman v. United States*, 247 U.S. 7, 15 (1918)).

We have previously held that the *Perlman* exception does not apply where the subpoena is directed at an attorney who is *currently representing* the party moving to quash the subpoena in connection with the

grand jury proceedings. *Niren*, 784 F.2d at 941; *In re Grand Jury Subpoena Dated June 5, 1985*, 825 F.2d 231, 237 (9th Cir. 1987). On the other hand, the denial of a motion to quash a subpoena directed at the movant's former attorney is appealable. *In re Grand Jury Subpoenas Duces Tecum (Lahodny)*, 695 F.2d 363, 365 (9th Cir. 1982). Although *In re Grand Jury Subpoena 92-1 (SJ)*, 31 F.3d 826 (9th Cir. 1994), concluded that the denial of a motion to quash a subpoena directed at a movant's attorney was immediately appealable without expressly discussing whether the attorney was still representing the movant, the opinion's citation to *Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 852-53 (9th Cir. 1991) (order immediately appealable because attorney was no longer representing the target of the subpoenas), indicates that the attorney was no longer representing the

movant. *See Subpoena 92-1 (SJ)*, 31 F.3d at 828-29. Also, an order denying a motion to quash a subpoena directed at an attorney representing the movant on a matter unrelated to the grand jury investigation is immediately appealable. *In re Subpoena to Testify Before the Grand Jury (Alexiou)*, 39 F.3d 973, 975 (9th Cir. 1994).

In *Niren* we expressed two reasons for the limitation of the *Perlman* exception: (1) the exception is intended to protect only those movants who are "powerless" to control the actions of the subpoenaed third party; and (2) it is particularly inappropriate to extend the exception to third-parties who are participants in the confidential relationship upon which the movant' claim of privilege is based. *Niren*, 784 F.2d at 941 (citing *National Super Spuds, Inc. v. New York Mercantile Exch.*, 591 F.2d 174, 179-80 n.7 (2d Cir.

1979) (Friendly, J.)). These factors become decisively strong in the situation where the subpoenaed party is actively representing the movant in connection with the grand jury investigation. *Subpoena Dated June 5, 1985*, 825 F.2d at 237; *cf. Alexiou*, 39 F.3d at 975.

[3] Under the above rationale, the *Perlman* exception does not apply here. Bailin was retained by Ord, Silva's attorney to represent Silva in a confidential, fiduciary capacity. He has remained Silva's agent throughout these proceedings, and is therefore subject to Silva's control to some degree. More importantly, Bailin is necessarily a party to the relationship upon which Silva's entire claim of privilege is based. It is in precisely these circumstances that a third party *can* be expected to risk contempt in order to protect the

privileged relationship.[1]

[4] It does no matter that Bailin is an accountant rather than an attorney. Our cases declining to extend the *Perlman* exception to this situation have not relied on any special fiduciary obligations of attorneys, but rather on the present, confidential nature of the movant's agency relationship with the third party, and the fact that the relationship was related to the grand jury investigation. *See Niren*, 784 F.2d at 941; *National Super Spuds*, 591 F.2d at 179 (third party was nonattorney employee of movant); *Subpoena Dated June 5, 1985*, 825 F.2d at 237. This is consistent with a strict application of the final judgment rule in the grand jury process, designed

---

[1]We noted in *Niren* that, where a principal directs his or her agent to resist a court order to comply with a subpoena, it may be appropriate for the contempt sanctions to be directed at the principal. 784 F.2d at 941-42.

to prevent parties from taking frivolous appeals for the purpose of delay. *Subpoena Dated June 5, 1985*, 825 F.2d at 236-37.

B

Although the United States argues that we have no subject matter jurisdiction over Silva's appeal, it nevertheless urges us to avoid the jurisdictional question and apply the doctrine of "hypothetical jurisdiction" in order to affirm on the merits. We decline to extend "hypothetical jurisdiction" to this case.

We have applied "hypothetical jurisdiction" in certain cases where jurisdiction is disputed to assume, without deciding, the existence of subject matter jurisdiction in order to reach the merits of an appeal. *Clow v. United States Dep't of Housing and Urban Dev.*, 948 F.2d 614, 616-17 n.2 (9th Cir. 1991).

The doctrine has several required elements: (1) the jurisdictional question must be difficult; (2) the merits of the appeal must be insubstantial; (3) the appeal must be resolved against the party asserting jurisdiction; and (4) undertaking a resolution on the merits as opposed to dismissing for lack of jurisdiction must not affect the outcome. *Id.*

[5] This case is not an appropriate one in which to apply this doctrine. It is sufficient to observe that the government's own argument reveals that resolving the appeal on the merits, rather than dismissing it for lack of jurisdiction, *will* affect the outcome. Because, as the government argues, we have no subject matter jurisdiction over this appeal, we cannot substantively alter the situation of the parties by deciding the appeal on the merits.

III

[6] Silva's eleventh-hour petition for review of the district court's order by extraordinary writ also fails. We have rejected attempts to use the All Writs Act as a means of avoiding the final judgment rule in the cpntext of motions to quash grand jury subpoenas. *Lampman v. United States Dist. Court*, 418 F.2d 215, 217 (9th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *City of Los Angeles v. Williams*, 438 F.2d 522, 522-23 (9th cir. 1971).

[7] In order to justify review by extraordinary writ, the district court's ruling on a motion to quash a grand jury subpoena must amount to a judicial "usurpation of power." *Lampman*, 418 F.2d at 217. No such usurpation is present here; it was obviously within the district court's jurisdiction to rule on Silva's motion to quash, and to decide whether the

subpoenaed materials are privileged.[2] *Williams*, 438 F.2d at 523.

Our focusing on our earlier cases of *Lampman* and *Williams* concerning the standards for the issuance of extraordinary writs should not be construed as establishing a rule different from that set forth in *Bauman v. District Court*, 557 F.2d 650 (9th Cir. 1977)(five factor framework for deciding petitions for extraordinary writs). It is clear that petitioner cannot succeed under *Lampman* and *Williams*. An application of the *Bauman* factors would not compel a different result.

IV

We DISMISS Silva's appeal for lack of subject matter jurisdiction. Silva's petition for relief under the all Writs Act is DENIED.

---

[2]We express no opinion on the correctness or incorrectness of the district court's determinations.

(STAMP)
FILED
SEP 21, 1994
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE GRAND JURY SUBPOENA DUCES TECUM, DATED MARCH 15, 1994, ISSUED TO CHARLES BAILIN.	NO. C-94-7008-WAI MEMORANDUM OF DECISION

The motion of Edward Silva, Jr. and Silva Harvesting, Inc. to quash or modify subpoena issued to Charles Bailin is DENIED.

In this matter Items 3-6 of the Subpoena to Testify Before Grand Jury served upon Charles Bailin are involved. The court conducted an evidentiary hearing upon this motion on September 19, 1994, and now makes the following findings:

1. Charles Bailin is and at all

times herein relevant was an accountant in Salinas, California, and since approximately 1972 had performed accounting services including the preparation of income tax returns for movants herein.

2. On or about March 26, 1992, Revenue Agent Davis made contact with Movants with respect to an audit of the 1989 individual income tax return of Movant Edward Silva and his wife. Agent Davis was referred to Mr. Bailin, the Silvas' accountant.

3. On April 7, 1992, Agent Davis contacted Accountant Bailin to advise him that the 1990 tax form 1120 for Movant Silva Harvesting would be added to the audit.

4. Because Bailin recognized Agent Davis as a person who handled large matters and because multiple tax years were then involved in the audit, Bailin

recommended to the Silvas that they employ a tax attorney. Sometime prior to June 22, 1992, Bailin introduced Attorney Edward O.C. Ord to Mr. Silva at Bailin's office, left them alone together and subsequently was advised by Mr. Ord that he, Ord, had been employed by Silva as the latter's attorney. At that same date and place Bailin testified that Ord employed Bailin and his accounting firm to act as his sub-agent in the performance of his legal work for the Silvas.

5. Mr. Bailin testified that his employment occurred on or about April 7, 1992, but there appears to be some uncertainty with respect to the exact date. The employment, however, is corroborated by a statement for services dated July 22, 1992, and mailed to Movant Silva in care of Ned Ord at the latter's address in San Francisco purporting to cover services performed within 30 days

prior to the date of the statement. Based upon this, I find that the evidence supports the performance of some work by Bailin commencing on or after June 22, 1992. There is no evidence with respect to the date of employment of Bailin by Ord other than the testimony of Bailin. In a Q and A taken by Special Agent Scott of Bailin, Mr. Ord was present and stated on the record that he could not remember the precise date. Nothing was offered in evidence to corroborate the date of the employment other than the July 22 statement contained within Exhibit 10b. Bailin testified that he did not know the exact date in April upon which he was employed by Ord and I, therefore, find in the absence of any contradictory evidence that April 15, 1992, can reasonably be treated as the date of employment in this matter.

6. On July 21, 1992, Agent Davis

met with Accountant Bailin and gave him a schedule listing ten cash payments which she stated had been made to Movant Silva Harvesting, (Ex. 3), and asked Bailin to trace the cash payments in the corporate books.

7. On December 14, 1992, Agent Davis and Accountant Bailin met and Bailin stated to Davis that he could trace only two of the ten cash payments included on Exhibit 3. He stated that he made this disclosure and representation to Agent Davis pursuant to direction and control of his principal, Attorney Ord. Further discussion ensued between Bailin and Davis. I find that, as just stated, the inquiry resulting in the search conducted by Bailin was initiated not by Attorney Ord but by the Internal Revenue Service. Therefore since one claiming privilege must make a threshold showing that the information purported to be privileged was

communicated by the client to the lawyer in confidence and in order to seek legal advice, United States v. Abrahams, 905 F.2d 1276, 1283 (9th Cir. 1990), it is extremely doubtful whether the results of Bailin's search after the Internal Revenue Service inquiry is privileged at all in that it does not constitute a confidential communication between attorney and client. However, even if privilege is applicable, I find that when Ord was employed as Movant's attorney in April of 1992 and Bailin was then employed as Ord's sub-agent for the purposes of that representation any activities undertaken on the part of Bailin in behalf of Ord therefore became subject to the attorney-client and/or work product privileges and that the attorney-client privilege was waived by the disclosure made at Ord's direction on December 14, 1992. Inasmuch as the initial investigation by Bailin

into the ten purported cash payments received by Movant Silva Harvesting was initiated by an inquiry by an agent of the Internal Revenue Service and not by any inquiry germane to Ord's representation of Movants, the work product privilege never attached. Counsel for Movants has argued based upon § 41.1 of Jefferson Evidence Bench Book that any disclosure made at that time by Bailin thus waiving the attorney-client privilege must be limited to the words then spoken by Bailin and would not waive any privilege with respect to work product features of underlying documents, if any. This was characterized by counsel and by Jefferson as derivative privilege and is not applicable here since, as has been pointed out, the inquiries were conducted by reason of Internal Revenue Service inquiry and not by any inquiry generated to Bailin by Ord.

CONCLUSION

In accordance with the above, the court concludes that a preponderance of the evidence favors the employment of Bailin by Ord to perform consultive expert services to Ord on April 15, 1992. The attorney-client privilege asserted by Movants with respect to disclosures made by Bailin to Davis concerning the ten cash payments as privileged is without merit for the reasons just stated.

With respect to Items 3, 4, and 5 of Exhibit 9, Bailin shall produce the matters therein requested in compliance with the subpoena. With respect to Request No. 6 of Exhibit 9 relating to work papers incident to the preparation of income tax returns, there is no evidence before the court that any of the disclosures with respect to the 1992 personal income tax returns and the two corporate returns referred to in Request No. 6 were conveyed to Ord through Bailin

by Movants in confidence and were thereby privileged. Items such as work papers and underlying materials utilized in preparing tax returns and revealing the same to the Internal Revenue Service are not privileged unless some evidence indicates that such underlying information was expressed in confidence as a request for legal advice or otherwise and is, therefore, entitled to protection as privileged. United States v. Abrahams, 905 F.2d 1276 (9th Cir. 1990); United States v. Gurtner, 474 F.2d 297 (9th Cir. 1973). Therefore the underlying papers requested and other materials concerning the 1992 personal return and the two corporate returns shall be produced by Bailin pursuant to the said subpoena. With respect to the 1991 personal income tax return of Movant Edward Silva and wife, work papers underlying the preparation of that return were conveyed

to Bailin prior to his employment by Ord and, therefore, no question of privilege can exist with respect to those documents and they shall be forthwith produced by Bailin.

The 1992 personal income tax return of Edward J. Silva and Evelyn Silva, (Ex. 8), claims the Fifth Amendment privilege with respect to the source of funds listed in Schedule 6. Bailin shall forthwith and within ten days comply with the provisions of paragraphs 3, 4, 5 and 6 of the subpoena duces tecum EXCEPT THAT he shall not be required to produce any work papers or other material whatever which reveal the source of the income listed in Schedule 6 of Movants' personal income tax return for the year 1992.

Late in the day of September 20, 1994, counsel for defense filed a Supplemental Memorandum of Points and Authorities for consideration by the

court. The following areas were discussed in the Memorandum:

1. The Q and A containing statements of Revenue Agent Davis is double hearsay and should not have been admitted. Whether it should have been admitted or not is arguable but the fact is that the court did not consider the Q and A for that purpose or any other purpose other than one statement attributable to Mr. Ord who was not a witness or under oath.

2. That the Government is bound by the Declaration testimony of Attorney Ord because the Government introduced his declaration as a part of its case. No authority is cited for this unusual contention nor could there be.

3. Bailin had no duty to respond on a voluntary basis to an Internal Revenue Service inquiry. Whether he did have such a duty or did not, the fact is that he

responded.

4. The request for a stay on appeal is not timely and is made without notice to the adverse party.

DATED: 9-21-94 (handwritten)

//S//
WILLIAM A. INGRAM
United States District Judge

(STAMP)
I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office
ATTEST
RICHARD W. WIEKING
Clerk, U.S. District Court
Northern District of California
By //s//
Deputy Clerk
Date 9-21-94 (handwritten)

(STAMP)
FILED
SEP 27, 1994
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE GRAND JURY SUBPOENA DUCES TECUM DATED MARCH 15, 1994 ISSUED TO CHARLES D. BAILIN	NO. C-94-7008 WAI **ORDER**

Edward Silva's motion for a permanent stay pending appeal is denied. The motion for a temporary stay to allow application for a stay to be made to the Court of appeals is granted. Movant shall have an additional 5 court days in which to make application to the appellate court.

The Government invites this court to determine that this court's order of September 21, 1994 will not become a final appealable order unless and until the subpoenaed party defies the court's

enforcement order and is held in contempt, citing United States v. Ryan, 402 U.S. 530 (1971). The Government argues that no exception to the rule of U.S. v. Ryan applies because the person subject to subpoena in the instant case does not fall within the "Perlman exception." As a sub-agent of the target's attorney, the Government contends, he falls within the class of persons who are subject to the control of the person asserting the privilege and is a participant in the relationship out of which the privilege stems. In re Grand Jury Subpoena (Niren), 784 F. 2d 939 (9th Cir. 1980). Niren and the other cases cited by the Government find current attorneys of the person asserting the privilege to be persons expected to risk a contempt citation to preserve the attorney-client privilege. No case cited places non-attorney sub-agents of the attorney in that category.

DATED: 9-27-94 (handwritten)

//S//

William A. Ingram
UNITED STATES DISTRICT JUDGE

(STAMP)
FILED
OCT 4, 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE SUBPOENA DUCES TECUM, dated March 16, 1992.	No. 94-16684
EDWARD SILVA, JR., et al., Appellants,	DC# CV-94-7008-WAI Northern California (San Jose)
vs.	ORDER
UNITED STATES OF AMERICA, Appellees.	

Before: BROWNING, FARRIS and LEAVY, Circuit Judges

An appeal from the denial of a motion to quash a subpoena duces tecum is an interlocutory degree over which this court lacks jurisdiction. To obtain appellate review, the person moving to quash the subpoena must first refuse to comply with the court's order and then must be held in

contempt. In re Grand Jury Subpoenas Dated Dec. 10, 1987, 926 F.2d 847, 853-(9th Cir. 1991).

In Perlman v. United States, 247 U.S. 7, 15 (1918), the Court recognized an exception to this rule when the subpoenaed party cannot be expected to risk a contempt citation in order to protect the interests of a third party who is the target of a grand jury investigation. In such circumstances, the third party may take an immediate appeal from the order denying the motion to quash the subpoena. In re Grand Jury Subpoenas Duces Tecum (Lahodny), 695 F.2d 363, 365 (9th Cir. 1982).

Because there is a substantial question whether this appeal falls within the Perlman exception, appellee's motion to dismiss for lack of jurisdiction is denied. See United States v. Hooton, 693 F.2d 857, 858 (9th cir. 1982) (summary

adjudication only appropriate when issues are "so insubstantial as not to need further argument"). The parties shall address the jurisdictional issue in their briefs.

Appellant's motion for a stay of the district court's order requiring compliance with the subpoena duces tecum at issue is granted pending disposition of this appeal.

Appellee's alternative request to expedite the appeal is granted. Appellant's opening brief and excerpts of record are due October 14, 1994; appellee's brief is due October 24, 1994; the reply brief, if any, is due October 28, 1994.

No extensions of time shall be granted absent a written showing of extraordinary and compelling circumstances. 9th Cir. R. 31-2.3. Appellant shall monitor the issuance of

the Certificate of Record. Fed. R. App. P. 11(a). The Clerk shall place this case on the December 1994 San Francisco calendar.

(STAMP)
FILED
JUN 7, 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE: GRAND JURY SUBPOENA ISSUED TO CHARLES D. BAILIN	)	
EDWARD SILVA, JR; SILVA HARVESTING INC.; EDWARD O.C. ORD, INC.; and ORD & NORMAN,	)	No. 94-16684 D.C. No. DV-94-7008-WAI
Appellants, v.	)	
UNITED STATES OF AMERICA,	)	ORDER
Appellee.	)	

Before: WALLACE, Chief Judge, PREGERSON and BEEZER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of

the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Supreme Court, U.S.
FILED
OCT 10 1995
OFFICE OF THE CLERK

No. 95-25

In the Supreme Court of the United States

OCTOBER TERM, 1995

ORD & NORMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

ROBERT E. LINDSAY
GREGORY VICTOR DAVIS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court's denial of a motion to quash a grand jury subpoena directed to an accountant employed by an attorney representing the party being investigated by the grand jury was a final order subject to immediate appeal.

2. Whether the court of appeals abused its discretion in denying a petition for a writ of mandamus directing the district court to quash the subpoena.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	14
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Aetna Life Ins. Co. v. *Haworth*, 300 U.S. 227 (1937)	8-9
Allied Chem. Corp. v. *Daiflon, Inc.*, 449 U.S. 33 (1980)	13, 14
Church of Scientology v. *United States*, 113 S. Ct. 447 (1992)	10, 13
Cobbledick v. *United States*, 309 U.S. 323 (1940)	10, 12
Corporacion Insular de Seguros v. *Garcia*, 876 F.2d 254 (1st Cir. 1989)	11
DeFunis v. *Odegaard*, 416 U.S. 312 (1974)	9
DiBella v. *United States*, 369 U.S. 121 (1962)	10
Golden v. *Zwickler*, 394 U.S. 103 (1969)	9
Grand Jury Proceedings in the Matter of Fine, In re, 641 F.2d 199 (5th Cir. 1981)	11
Grand Jury Proceedings (Malone), In re, 655 F.2d 882 (8th Cir. 1981)	11
Grand Jury Proceedings (Vargas), In re, 723 F.2d 1461 (10th Cir. 1983)	8, 11, 13-14
Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, In re, 731 F.2d 1032 (2d Cir. 1984)	12
Iron Arrow Honor Soc'y v. *Heckler*, 464 U.S. 67 (1983)	9
Klein, In re, 776 F.2d 628 (7th Cir. 1985)	11, 12

Cases—Continued: Page

Lake Coal Co. v. *Roberts & Schaefer Co.*, 474 U.S. 120 (1985) 9
National Super Spuds, Inc. v. *New York Mercantile Exchange*, 591 F.2d 174 (2d Cir. 1979) 12
North Carolina v. *Rice*, 404 U.S. 244 (1971) 9
O'Connor v. *O'Connell*, 253 F.2d 365 (1st Cir. 1958) 12-13
Perlman v. *United States*, 247 U.S. 7 (1918) ... 4, 10
Reisman v. *Caplin*, 375 U.S. 440 (1964) 12
Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943) 13
Sealed Case, In re:
655 F.2d 1298 (D.C. Cir. 1981) 10, 11
737 F.2d 94 (D.C. Cir. 1984) 11
U.S. Bancorp Mortage Co. v. *Bonner Mall Partnership*, 115 S. Ct. 386 (1994) 9
United States v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982) 10
United States v. *Nixon*, 418 U.S. 683 (1974) 10
United States v. *Ryan*, 402 U.S. 530 (1970) 10, 11
Will v. *United States*, 389 U.S. 90 (1967) 13

Statute and rule:

28 U.S.C. 1291 9
Sup. Ct. Rule 46 2

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-25

ORD & NORMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-19a) is reported at 51 F.3d 203. The opinion and order of the district court (Pet. App. 20a-34a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1995. A petition for rehearing was denied on June 7, 1995. Pet. App. 39a-40a. The petition for a writ of certiorari was filed on July 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 1992, an Internal Revenue Service agent contacted former petitioner Edward Silva, Jr., concerning an audit of his individual income tax return for 1989.[1] Pet. App. 21a. Silva referred the agent to Charles Bailin, who for some 20 years had been Silva's accountant and had prepared tax returns for Silva and his company, former petitioner Silva Harvesting, Inc. In April 1992, the agent informed Bailin that the audit had been expanded to include Silva Harvesting's 1990 tax return. Bailin then recommended that Silva engage a tax attorney in connection with the audit. In April 1992, Bailin introduced Silva to petitioner Edward Ord. At that meeting, Silva engaged Ord to represent him in the audit, and Ord retained Bailin and his accounting firm to act as Ord's "sub-agent[s]" in connection with the representation. Bailin testified that all the actions he took in connection with the audit after Ord was retained were taken at Ord's direction. *Id.* at 8a-9a, 20a-22a.

In July 1992, the revenue agent gave Bailin a list of ten cash payments that had been made to Silva Harvesting in 1989, and requested that he trace them into Silva's books and records to determine whether they had been reported as income. Pet. App. 9a. The agent told Bailin that she suspected that the cash paid to Silva had been used illegally. Bailin undertook the requested inquiry, and in December 1992 he disclosed

---

[1] The petitions of Edward Silva, Jr., and Silva Harvesting, Inc., for a writ of certiorari in this case were dismissed on September 26, 1995, under Rule 46 of the Rules of this Court. See pages 6-7, *infra*.

to the agent that he could trace only two of the cash payments into Silva Harvesting's records. Bailin testified that he made that disclosure under the direction and control of Ord. *Id.* at 9a, 23a-24a.

The revenue agent subsequently referred the case to the IRS's Criminal Investigation Division, and in March 1994 an agent from that Division served Bailin with a grand jury subpoena demanding his testimony and the production of various documents. Pet. App. 9a-10a; Gov't C.A. Br. 9. The required documents included those related to the cash-tracing project, as well as all notes of conversations with the original revenue agent, Silva, or Silva's employees relating to that inquiry. Pet. App. 9a-10a. Silva moved to quash parts of the subpoena directed to Bailin, on the ground that the information sought was protected by his attorney-client privilege. See *id.* at 27a.

2. The district court held an evidentiary hearing and then, with one exception not relevant here, denied the motion to quash. Pet. App. 20a, 27a-29a. The court found that Bailin was employed as Ord's sub-agent in Ord's performance of legal work for Silva. *Id.* at 22a-23a, 25a. The court indicated, however, that it was "extremely doubtful" whether the results of Bailin's investigation, which was undertaken in response to an inquiry from the IRS rather than one from Ord, could represent or embody the sort of confidential communication, made for the purpose of seeking legal advice, that is protected by the attorney-client privilege. *Id.* at 24a-25a. In any event, the court concluded that, even if the privilege applied, it was waived by Bailin's December 1992 disclosure of the results of his investigation to the IRS at Ord's direction. *Id.* at 25a. Finally, the court held that no

attorney "work product" privilege ever attached to Bailin's investigation, again because it was initiated at the IRS's request, "not by any inquiry germane to Ord's representation" of Silva and Silva Harvesting. *Id.* at 25a-26a.

3. The court of appeals stayed the district court's order enforcing the subpoena, expedited the appeal filed by Silva, Silva Harvesting, and remaining petitioners Ord, Edward O.C. Ord, Inc., and Ord & Norman, and directed the parties to brief the issue of appellate jurisdiction. Pet. App. 35a-38a. The same parties also sought review of the district court's order through a petition for a writ of mandamus, which the court of appeals consolidated with the appeal. See *id.* at 2a, 7a-8a, 18a-19a.

After briefing and argument, the court of appeals dismissed the appeal for lack of jurisdiction and denied the petition for mandamus. Pet. App. 8a, 10a. The court first noted (*id.* at 11a) that the denial of a motion to quash normally is not appealable as a final order, but may be challenged immediately only by refusing to comply and then appealing from a final order of contempt. The court recognized a "narrow exception" to that rule, rooted in this Court's decision in *Perlman* v. *United States*, 247 U.S. 7 (1918), "where the subpoena is directed at a third party who 'cannot be expected to risk a contempt citation' in order to preserve the movant's right to appeal." *Id.* at 11a. The court explained, however, that it had previously held that the *Perlman* exception does not apply if the subpoena is directed to an attorney who is currently representing the movant in connection with the grand jury proceedings. *Id.* at 11a-13a. Under those circumstances

the movant is not powerless to control the actions of the subpoenaed party, and it would be "particularly inappropriate to extend the exception to third-parties who are participants in the confidential relationship upon which the movant's claim of privilege is based." *Id.* at 13a.

Applying the same rationale, the court concluded that the *Perlman* exception to the rule of non-appealability should not apply in cases like this one, where the subpoenaed party is a non-attorney agent of the movant. Pet. App. 10a, 14a. The court observed that Bailin was retained by Silva's attorney to represent Silva in a confidential, fiduciary capacity, and was therefore to some degree subject to Silva's control. *Id.* at 14a. More important, in the court's view, Bailin was "necessarily a party to the relationship upon which Silva's entire claim of privilege is based." *Ibid.* The court held that it was "in precisely these circumstances that a third party *can* be expected to risk contempt in order to protect the privileged relationship." *Id.* at 14a-15a.[2]

The court of appeals rejected any distinction based on the fact that Bailin is an accountant rather than an attorney. Pet. App. 15a. The court pointed out that its prior cases declining to extend the *Perlman* exception to agency relationships were based not on any special fiduciary obligations of attorneys, but on the "present, confidential nature of the movant's agency relationship with the third party, and the fact that the relationship was related to the grand

---

[2] The court noted that if a principal directs an agent to resist a court order to comply with a subpoena, "it may be appropriate for the contempt sanctions to be directed at the principal." Pet. App. 15a n.1.

jury investigation." *Ibid.* The court concluded that extension of the rule to non-attorney confidential agents was "consistent with a strict application of the final judgment rule in the grand jury process, designed to prevent parties from taking frivolous appeals for the purpose of delay." *Id.* at 15a-16a.

Having held that the district court's order was not final for purposes of appeal, the court declined to invoke "hypothetical jurisdiction" to resolve the issue before it on the merits. Pet. App. 16a-17a. The court also denied what it termed "Silva's eleventh-hour petition for review of the district court's order by extraordinary writ." *Id.* at 18a. Observing that such writs are not to be used to avoid the final judgment rule, the court held that a district court's ruling on a motion to quash may not be reviewed on a petition for mandamus unless it "amount[s] to a judicial 'usurpation of power.'" *Ibid.* The court found no such abuse in the district court's exercise of its jurisdiction in this case. *Id.* at 18a-19a.

The court of appeals denied an application to stay its mandate. On July 7, 1995, Justice O'Connor denied a similar application.

ARGUMENT

1. Recent events have rendered this case moot.

After this Court declined to stay the court of appeals' mandate, Charles Bailin appeared before the grand jury. He refused to comply with the district court's order that he produce the subpoenaed documents, and on August 10, 1995, that court found him in contempt.

On August 22, 1995, the United States and former petitioner Edward Silva entered into a plea agreement under which Silva agreed, among other things, to

waive indictment and to plead guilty to a charge of willfully signing and filing a false corporate income tax return for Silva Harvesting for its 1988 tax year. Silva also agreed to move to dismiss his petition for a writ of certiorari in this case. Plea Agrmt. ¶ 1(a) and (f). The government agreed, among other things, to move to dismiss the contempt charge against Bailin; not to file any additional criminal charges against Silva, Silva Harvesting, or Silva Harvesting's employees for known offenses arising out of the criminal investigation conducted by the IRS and the grand jury; and to discontinue the pending grand jury investigation of Silva, Silva Harvesting, and its employees, including withdrawing any pending grand jury subpoenas. Plea Agrmt. ¶ 3(a), (c) and (d).

The district court accepted the plea agreement on August 22, 1995, and on August 24 it entered an order purging Bailin's contempt. App., *infra*, 1a. On September 7, petitioners Silva and Silva Harvesting asked this Court to dismiss their petition as moot, because of the plea agreement and because "the grand jury subpoena of Bailin has been withdrawn and the grand jury investigation is terminated." Mot. to Dismiss 2. The motion was granted, as to those petitioners, on September 26, 1995.

The real parties in interest on appeal in this case were Edward Silva and his company, Silva Harvesting.[3] Any evidentiary privilege asserted in the case belonged primarily to them, not to their lawyers. Now that those parties have dismissed their petitions,

---

[3] Charles Bailin, to whom the subpoena in question was directed, did not participate in the appeal of the district court's order denying the motion to quash. See Pet. iii.

however, the only remaining petitioners are their attorney, Edward Ord, his professional corporation, and his law firm.[4]

The motion to dismiss filed by Ord on behalf of his clients requests that this Court continue to entertain the petition on behalf of the other petitioners alone, on the ground that "the issue of work product is still at issue and the other petitioners regularly represent clients who are being investigated by the IRS. The current decision of the Ninth Circuit puts all the work product of the firm's clients in jeopardy in the future." Mot. to Dismiss 2. But even if the remaining petitioners had an independently cognizable interest in asserting the work-product privilege (as opposed to the attorney-client privilege, which is exclusively that of the client) with respect to particular documents involved in this case (see, *e.g.*, *In re Grand Jury Proceedings (Vargas)*, 723 F.2d 1461, 1466 (10th Cir. 1983)), the government is no longer seeking any of those documents. Petitioners' speculative assertion of possible interference with the general interests of unnamed future clients is not the sort of "definite and concrete" controversy necessary to support the exercise of jurisdiction by a federal court.[5] *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227,

---

[4] The court of appeals' opinion lists only the professional corporation and the law firm as appellants. Pet. App. 2a, 7a. The amended notice of appeal filed in the district court on September 29, 1994, however, also listed Ord in his individual capacity.

[5] The original controversy in this case is not likely to recur between the real parties in interest. Under the plea agreement, the government has withdrawn all pending subpoenas, discontinued the pending grand jury investigation, and agreed

240-241 (1937) (jurisdiction requires "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts"); see also, *e.g.*, *Lake Coal Co.* v. *Roberts & Schaefer Co.*, 474 U.S. 120 (1985) (per curiam) (denying motion to decide questions presented despite complete settlement of the underlying causes of action); *Iron Arrow Honor Soc'y* v. *Heckler*, 464 U.S. 67, 71 & n.1 (1983) (per curiam); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) (per curiam); *Golden* v. *Zwickler*, 394 U.S. 103, 109-110 (1969) (questions "must be presented in the context of a specific live grievance"). The petition for a writ of certiorari on behalf of the remaining petitioners should therefore be dismissed as moot.[6]

2. In any event, the court of appeals correctly held that the district court's denial of the motion to quash the grand jury subpoena in this case was not a final order appealable under 28 U.S.C. 1291. As petitioner concedes (Pet. 12), such an order is ordinarily not subject to immediate appeal. A party wishing to challenge the order must instead refuse to comply,

---

not to file further criminal charges for any other offenses discovered as part of the underlying criminal investigation. The contempt citation issued to accountant Bailin has been purged. Nor is the question presented one that will likely evade review in any future case that is not settled by agreement of the parties in interest. See, *e.g.*, *DeFunis* v. *Odegaard*, 416 U.S. 312, 318-319 (1974) (per curiam).

[6] Because this case became moot through voluntary actions of the parties in interest taken after the court of appeals' decision had become final, there is no reason to vacate the decision below. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386 (1994).

and then appeal from any ensuing judgment of contempt. *United States* v. *Ryan*, 402 U.S. 530 (1970); *Cobbledick* v. *United States*, 309 U.S. 323 (1940). Indeed, that is the course that was followed after the court of appeals' decision in this case, although the case was ultimately resolved through the plea agreement before there was any occasion for appeal of the contempt order entered against accountant Bailin.

This Court has recognized an exception to the general rule of nonappealability for cases like *Perlman* v. *United States*, 247 U.S. 7 (1918), in which the lower court's order is directed not to a party with an interest in challenging the order, but to "a disinterested third party * * * [who] presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." *Church of Scientology* v. *United States*, 113 S. Ct. 447, 452 n.11 (1992); see also *Ryan*, 402 U.S. at 533; *United States* v. *Nixon*, 418 U.S. 683, 691 (1974). As the court of appeals recognized (Pet. App. 15a-16a), however, that exception should be narrowly construed, because of the "strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals" (*Nixon*, 418 U.S. at 690), which "is at its strongest in the field of criminal law." *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (per curiam); see also *Ryan*, 402 U.S. at 532-533; *DiBella* v. *United States*, 369 U.S. 121, 126 (1962); *In re Sealed Case*, 655 F.2d 1298, 1301-1302 (D.C. Cir. 1981) (R.B. Ginsburg, J.). The court properly—and, as subsequent events demonstrated, correctly—concluded (Pet. App. 14a-15a) that a confidential agent like Bailin would have adequate incentive to risk a contempt citation in

order to preserve his principal's ability to appeal, so that the case did not fall within "the limited class of cases where denial of immediate review [of the order enforcing the subpoena] would render impossible any review whatsoever of [the principal's] claims." *Ryan*, 402 U.S. at 533.

As petitioners point out (Pet. 12-20), the courts of appeals have adopted somewhat different approaches to application of the *Perlman* exception in cases where a subpoenaed third party is an officer, attorney, or other confidential agent of the party seeking to appeal denial of a motion to quash. Compare, *e.g.*, Pet. App. 11a-16a (not applicable to current agent with confidential relationship related to grand jury proceeding), *Corporacion Insular de Seguros* v. *Garcia*, 876 F.2d 254, 258-259 (1st Cir. 1989) (not applicable to attorney or close aide), and *In re Grand Jury Proceedings (Vargas)*, 723 F.2d at 1465-1466 (not applicable to attorney unless client can prove attorney will not risk contempt) with, *e.g.*, *In re Grand Jury Proceedings in the Matter of Fine*, 641 F.2d 199, 201-203 & n.3 (5th Cir. 1981) (client may appeal order to attorney in the "usual" attorney-client situation), *In re Grand Jury Proceedings (Malone)*, 655 F.2d 882, 885 (8th Cir. 1981), and *In re Klein*, 776 F.2d 628, 630-632 (7th Cir. 1985). The decisions involved are potentially very sensitive to factual variations, and it is therefore difficult to gauge the practical significance of apparent differences among the courts. Compare, *e.g.*, *In re Sealed Case*, 655 F.2d at 1302 (no immediate appeal, focusing on role of in-house counsel on particular facts) with *In re Sealed Case*, 737 F.2d 94, 97-98 (D.C. Cir. 1984) (R.B. Ginsburg, J.) (appeal allowed where former general counsel stated under

oath that he would not stand in contempt); compare *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 591 F.2d 174, 179-180 & n.7 (2d Cir. 1979) (Friendly, J.) (no appeal from order directed to responsible official of public agency) with *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1036 n.3 (2d Cir. 1984) (appeal ordinarily available from order directed to outside counsel); see also *In re Klein*, 776 F.2d at 631. Although it may ultimately be desirable for this Court to provide further guidance on the proper scope of the *Perlman* exception, there is no reason to do so in a case that has been voluntarily dismissed by the real parties in interest, and in which it is clear that appellate review would have been available in any event, if it had been desired, through the usual procedural mechanism of appeal from Bailin's citation for contempt.

Finally, petitioners argue (Pet. 31-34) that under *Reisman* v. *Caplin*, 375 U.S. 440 (1964), they would have had the right to appeal an order directing Bailin to comply with an administrative summons issued by the IRS, and that a parallel rule should apply in the case of a grand jury subpoena. In determining finality for purposes of appeal, however, this Court has distinguished sharply between cases in which a court enforces a grand jury subpoena, which is "ancillary to [a] judicial proceeding" that could be disrupted by an immediate appeal, and cases in which the court enforces an administrative summons, and in which the judicial enforcement proceeding provided for by statute is, from the court's point of view, "complete in itself." *Cobbledick*, 309 U.S. at 329-330; see also *Reisman*, 375 U.S. at 449 (citing *O'Connor* v.

O'Connell, 253 F.2d 365, 365-367 (1st Cir. 1958), which applied *Cobbledick*'s reasoning to enforcement of an IRS summons); *Church of Scientology*, 113 S. Ct. at 452 n.11. There is no reason to revisit that distinction in this case.[7]

3. Petitioners argue (Pet. 51-63) that the court of appeals erred in denying their alternative request for a writ of mandamus. As this Court has made clear, however, "the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (per curiam). In particular, mandamus is not to be used to "undermine the settled limitations upon the power of an appellate court to review interlocutory orders." *Id.* at 35, quoting *Will* v. *United States*, 389 U.S. 90, 98 n.6 (1967). Thus, mandamus "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Will*, 389 U.S. at 95, quoting *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). "Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy." *Allied Chem. Corp.*, 449 U.S. at 35.

The court of appeals correctly applied those principles in this case. Pet. App. 18a-19a; see also, *e.g.*, *In re Grand Jury Proceedings (Vargas)*, 723 F.2d at 1466-

---

[7] Petitioners have offered no factual support for their suggestion (Pet. 34) that the IRS converted its original civil investigation into a criminal investigation, and ultimately into a grand jury proceeding, for the purpose of depriving Silva or Silva Harvesting of a right to appellate review of their privilege claims.

1467. Observing that mandamus should not be used "as a means of avoiding the final judgment rule" (Pet. App. 18a), the court concluded that "it was obviously within the district court's jurisdiction to rule on Silva's motion to quash, and to decide whether the subpoenaed materials [were] privileged" (*id.* at 18a-19a). The district court's decision therefore involved nothing like the "judicial usurpation of power" contemplated by this Court in *Allied Chemical*, 449 U.S. at 35. Moreover, on the facts of this case, in which accountant Bailin ultimately proved willing to go into contempt to preserve the taxpayers' ability to appeal, the parties seeking mandamus failed to demonstrate that they had "no other adequate means to attain the relief [they] desire[d]" or to show that their right to issuance of the writ was "clear and indisputable." *Ibid.* Even if the case were not moot, there would be no reason for further review.

CONCLUSION

The petition for a writ of certiorari should be dismissed as moot. Alternatively, the petition should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

ROBERT E. LINDSAY
GREGORY VICTOR DAVIS
Attorneys

OCTOBER 1995

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-94-7008 WAI

IN RE GRAND JURY SUBPOENA DUCES TECUM
DATED MARCH 15, 1994, ISSUED TO
CHARLES D. BAILIN

[FILED Aug. 24, 1995]

ORDER

Upon application of the United States and good cause having been demonstrated, IT IS HEREBY ORDERED that the August 10, 1995, civil contempt of Charles Bailin be purged.

Dated: 8/24/95

/s/ William A. Ingram
WILLIAM A. INGRAM
United States District Judge

(3)

95-25

No. _____

Supreme Court, U.S.
FILED
NOV 6 1995
CLERK

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Edward Silva, Jr.; Silva Harvesting, Inc.; Ord & Norman; E.O.C. Ord, Inc.; and Edward O.C. Ord, *Petitioners*

v.

United States of America, and United States District Court for Northern California, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

---

REPLY OF ORD & NORMAN, E.O.C. ORD, INC., AND EDWARD O.C. ORD TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR CERTIORARI

EDWARD O.C. ORD
Counsel of Record
ORD & NORMAN
650 California Street
San Francisco, CA 94108
415/274-3800
Counsel for Petitioners

October 27, 1995

BEST AVAILABLE COPY

22 pp

PUBLISHER'S NOTE

THE FOLLOWING PAGE IS UNAVAILABLE FOR FILMING

TABLE OF CONTENTS

Table of Authorities 3

TABLE OF AUTHORITIES

CASES

Church of Scientology,
113 S. Ct. 447 (1992) 16

Duplan Corp. v Moulinage et Restorderie
de Chavanoz, 487 F. 2d 480 (4th
Cir., 1973) 7

Hickman v Taylor,
329 U.S. 495 (1947) 6

Liberty Mut. Ins. Co. v. Fales,
8 Cal 3d 712 (1973) 11

Reisman v. Caplin,
375 U.S. 440 (1960) 9

Southern Pacific Terminal Company v.
Interstate Commerce Commission,
219 U.S. 498 (1911) 12

U.S. v Nobles,
422 U.S. 225 (1995) 7

U.S. v. Powell,
379 U.S. 48 (1964) 18

STATUTES, REGULATIONS AND RULES

F.R.C.P. 26(b)(3) 6

OTHER AUTHORITIES

C.A. Wright, et. al., 13A Federal Practice and Procedure §3533.8 (1977) 11

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

Edward Silva, Jr.; Silva Harvesting, Inc.; Ord & Norman; E.O.C. Ord, Inc.; and Edward O.C. Ord, *Petitioners*

v.

United States of America, *Respondent*

REPLY OF ORD & NORMAN, E.O.C. ORD, INC., AND EDWARD O.C. ORD TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR CERTIORARI

The Solicitor General's Opposition (hereinafter referred to as "SGO") omits the fact that besides the order purging

Mr. Bailin's contempt, the government moved to dismiss any action for contempt. This motion was granted. Thus, the situation remains that the erroneous, prejudicial District Court decision against the firm of Ord & Norman, the professional corporation, and Mr. Ord, the individual remains. This decision is adverse to these parties as is the Ninth Circuit jurisdictional decision which denies review of prejudicial District Court decision. The Ninth Circuit Court of Appeals now requires the experts hired by Ord to go to jail before the firm can test the attorney client and/or work product privileges.

It is not necessary to cite cases including *Hickman v. Taylor*, 329 U.S. 495

(1947), *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 483 and footnote 12 (4th Cir. 1973), holding that the work product privilege belongs to the attorney and his firm, not the client, and that they assert the privilege. The attorney's work product is protected from compelled disclosure in criminal and civil proceedings. See *U.S. v. Nobles*, 422 U.S. 225 (1995) [criminal case] and Fed. R. Civ. P. 26(b)(3). To our knowledge no one disputes these black letter rules of law. Thus, the controversy continues. It is our work product that was deemed discoverable. Mr. Bailin just happened to be in possession of copies of our work product in the continuing engagement which actually continues to this date and will

do so until the ongoing civil investigation is over. As part of the plea agreement Silva admitted to omitting millions from gross income. There will be a continuing civil tax investigation after the criminal case and the same issues are continuing in nature as the government tries to collect any tax debts. These issues include both privileges, the waiver rulings, and the mandatory contempt ruling of the District Court. In fact, as part of the plea agreement, Silva must cooperate in the civil audit during his supervised release. The remaining petitioners are facing a decision of the District Court involving a decision that privileges did not attach and/or broad waiver. In fact, the transcript of the

oral argument before the Ninth Circuit indicates that the Court believed that the District Court decision **was incorrect!** Judge Wallace so stated. Finally, we will have difficulty in getting experts to work for our firm, because now they have to commit contempt to protect the privileges. This decision is hurting our firm, as well as the issues in this petition which are **continuing** in nature.

SGO page 13 footnote 7 is incorrect. In the record below transcripts of the IRS summons and hearing are in the record where we asserted the twin privileges before the hearing officer Special Agent, and we made a *Reisman v. Caplin*, 375 U.S. 440 (1960) good faith refusal to answer or comply with record demands. Instead of

enforcing the IRS summons to obtain an enforcement order, which is a final appealable order, the IRS got around this requirement by going directly to the local U.S. Attorney and procuring and shifting to a grand jury subpoena.

Our petition clearly shows that the state of the law cries out for a **uniform** rule from this Court so every law firm in the country is treated equally for the purposes of attorney client and/or work product privileges. It should not turn on such whimsical factors as whether a particular expert hired by the attorney is willing to go to jail so the privilege can be tested. Nor should this important privilege which goes to the tap root of giving persons **honest** advice turn on the

circuit in which the investigation happens to take place.

The issues here are of an important nature nationwide. Thus, the Court should accept the case for review. In a proceeding that may otherwise be deemed moot, Courts have discretion to resolve an issue of continuing public interest that is likely to recur in other cases. *Liberty Mut. Ins. Co. v. Fales*, 8 Cal. 3d 712, 715-716, 505 P.2d 213 (1973). It is particularly appropriate when it is likely to affect the future rights of the parties. These conditions are applicable here as indicated above.

Moreover, omitted from the long dissertation on mootness by the SGO is the large body of case law denying mootness in

facts and circumstances similar to the instant appeal. The denial of mootness generally occurs when three elements are present. They are: (1) repetition of the official acts that provoked the litigation, (2) the risk that effective remedies cannot be provided in the event of repetition, and (3) the individual plaintiff will be affected in the event of repetition. Southern Pacific Terminal Company v Interstate Commerce Commission, 219 U.S. 498, 515 (1911); 13A Wright & Miller §3533.8.

All of these elements are satisfied in the present case. First, the official acts which provoked this case will undoubtedly be repeated. Although the criminal charges have been settled, the

civil tax case continues in the District Court, and the existing District Court decision continues to apply to the petitioners.

Under judicial notice, this Court is aware that government will continue to issue grand jury subpoenas seeking to invade the attorney-client and work product privileges. As a matter of fact, the Department of Justice has developed litigation strategies to do just that. Further, the case law is replete with examples of such governmental conduct.

Such conduct will undoubtedly continue against Ord and his firm. This is already the IRS's second attempt to invade the attorney-client and work product privileges by means of a grand

jury subpoena.

Second, in the event the IRS repeats such conduct, Ord and his firm will not have an effective remedy. As the Ninth Circuit decision currently stands, a hired expert must face contempt charges and jail time before the attorney-client and work product privileges can be tested. Since no hired expert will ever do this, there is no effective remedy.

Further, the Ninth Circuit decision actually encourages the government to invade the attorney-client and work product privileges. After all, the government knows that no hired expert will face contempt charges and jail time so the privileges can be tested with no guarantee of the outline. In essence, then, the

Ninth Circuit decision encourages governmental overreaching--overreaching which evades review permanently unless this Court takes this case and makes a uniform rule.

Finally, it is certain that the IRS will rely on District Courts decision in the civil investigation. Thus, the attorney-client and work product privileges, Ord and his firm will be affected due to the continuing nature of the civil tax investigations against petitioners, and due as well to the existing case against Ord & Norman which the Ninth Circuit has said was incorrectly decided. Further, as mentioned above, Ord and his firm have been summoned twice before, and it will undoubtedly happen

again.

It should be noted that Ord and his firm are not the only parties to be affected by the Ninth Circuit's Decision. Indeed, this is an area of the law which cries out for nationwide uniformity. This is one of the points of our appeal. The important issues of privilege arising in this case should not turn on whether a hired expert serves jail time or on the Circuit from which the subpoena is issued.

Moreover, the instant case should be covered by the reasoning and concepts of *Church of Scientology*, 113 S.Ct. 447 (1992), especially as this Court has repeatedly stated in cases where the District Court's **enforcement** powers were upheld that the IRS summons is the **legal**

equivalent of the grand jury subpoena, and orders from the enforcement of an IRS summons are final appealable orders. See our petition pages 32-35, and footnote 9.

We have been hurt by the incorrect decision of the District Court and the jurisdictional decision of the Ninth Circuit. We are all parties before the Courts below and in this Court and continue to have standing to challenge the erroneous decision of the Circuit denying us review of a District Court decision which the Ninth Circuit indicated was erroneous, is a final appealable Order. Likewise, the tax dispute continues and is part of the "dodging" discussion at SGO at p.12-13 which ignores the fact that under either the summons or the subpoena it is

the **order using the Court enforcement powers** that is at issue and being appealed. Thus, CSGO the type of legal process which causes the Court enforcement is not material. Thus, the discussion on pp. 12-13 is completely besides the point. Moreover, as indicated in our Petition on p.32-35 and the cases in footnote 9, this is why this Court treats both types of subpoena/summons **exactly** the same legally for Court order **enforcement** purposes!

As this Court stated in U.S. v. Powell, 379 U.S. 48, 57 (1964) concerning the sameness of an IRS Summons and a Grand Jury Subpoena:

> The administrative investigative function, in searching out violations with a view to enforcing the Act is essentially the same as the Grand Jury's or the Court's issuing other

> pretrial orders for the discovery of evidence.
>
> The administrative agency has the power of inquisition...[which] is more analogous to the Grand Jury, while the power of the Commissioner of the Internal Revenue derives from a different body of statutes, we do not think they are analogous to the other agency situations without force...It is the Court's process which is invoked to enforce... . (emphasis added)

Thus, it makes no difference if the process sought to be enforced is grand jury or an administrative summons, because it is the enforcement order that is at issue. We are parties before the Courts below and continue to request relief over a continuing matter involving the sanctity of our files protection of experts we hire and the continuing process in the civil tax case.

If the Court wishes us to file the transcript of the IRS summons hearing before the grand jury was issued or the transcript of the oral argument before the Ninth Circuit which is also part of the record in the District Court we will be happy to do so. We can also document from the record the other factual errors cited above as requested.

As indicated in our petition, the writ process certainly should have been allowed as it traditionally is used to avoid the compelled waiver of common law privileges as the bell cannot be unrung.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

EDWARD O.C. ORD

Counsel of Record
ORD & NORMAN
650 California Street
San Francisco, CA 94108
415/274-3800
Counsel for Petitioners

October 27, 1995

6265REP.SCT

PROOF OF SERVICE BY MAIL

I, Edward O.C. Ord, declare as follows:

That I am employed in the County of San Francisco, State of California, I am over the age of eighteen years, and not a party of the within action. My business address is 650 California Street, 26th Floor, San Francisco, CA 94108.

On ~~October~~ November 3, 1995, I served the within **REPLY OF ORD & NORMAN, E.O.C. ORD, INC., AND EDWARD O.C. ORD TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR CERTIORARI** on the interested parties in this action, by placing a true and correct copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box, addressed as follows:

Solicitor General
Department of Justice
Washington, DC 20530

G. William Hunter, Esq.
1300 Clay Street, Suite 510
Oakland, California 94612

I declare under penalty of perjury that the foregoing is true and correct.

Executed on ~~October~~ November 3, 1995, at San Francisco, California.

Edward O.C. Ord

Edward O.C. Ord